

FEB 14 1986

JOSEPH F. SPANIOLO, JR.
CLERK

No. 85-599

4

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN BAR ENDOWMENT

UNITED STATES OF AMERICA, PETITIONER

v.

FREDERIC D. TURNER, ET UX., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
FILED OCTOBER 7, 1985
CERTIORARI GRANTED DECEMBER 2, 1985

Volume I

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* The opinion and judgment of the court of appeals, and the opinion and judgment of the Claims Court, are printed in the appendix to the petition for writ of certiorari and have not been reproduced here.

In the United States Claims Court

No. 465-82T

AMERICAN BAR ENDOWMENT, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Sep 16 1982	Filing fee of \$10 paid by plaintiff.
Nov 15 1982	Defendant's motion for enlargement of time (to JAN 14 1982) to respond to the complaint filed. Service by mail: NOV 15 1982 ALLOWED: NOV 16 1982.
Dec 28 1982	See Case No. 366-79 C for Order assigning case to Chief Judge Alex Kozinski. Copy to parties.
Jan 3 1983	Order entered governing proceedings before trial. Copy to parties.
Jan 12 1983	Defendant's motion for enlargement of time (to JAN 28 1983) to file its answer filed. Service by mail: JAN 12 1983. ALLOWED: JAN 17 1983 endorsement on motion.
Jan 17 1983	Notice to counsel filed. Copy to parties.
Jan 17 1983	Amended Order governing proceedings before trial filed. Copy to parties.
Jan 25 1983	Defendant's motion for enlargement of time (to FEB 11 1983) to file its answer to the complaint filed. Service by mail: JAN 25 1983. DENIED as moot: MAR 2 1983.

Feb 7 1983 Notice to counsel and order filed. [plaintiff's memorandum: 21 days; defendant's response: 14 days thereafter] Copy to parties.

Feb 11 1983 Defendant's answer filed. Service by mail: FEB 11 1983.

Feb 17 1983 Defendant's motion for summary judgment, supporting brief, and appendix B (two separate documents filed. Service: FEB 17 1983. Pleadings rejected for failure to comply with order of January 17, 1983: FEB 22 1983.

Feb 23 1983 Defendant's motion for summary judgment filed. Service: 2/23/83. WITHDRAWN. SEE ORDER ENTERED MAY 13 1983.

Feb 23 1983 Appendix B to defendant's brief (in one bound volume) filed. Service: 2/17/83.

Feb 25 1983 Plaintiff's memorandum in response to the court's order of February 7, 1983 filed. Service: 2/25/83.

Mar 4 1983 Defendant's motion for leave to amend the answer filed. Service: MAR 4 1983. ALLOWED as unopposed: MAR 10 1983.

Mar 8 1983 Plaintiff's response to defendant's motion for leave to amend answer filed. Service by mail: 3/8/83.

Mar 10 1983 Defendant's first amended answer filed. Service: 3/4/83.

Mar 11 1983 Defendant's motion for extension of time (to March 18, 1983) to file its memorandum in response to the Court's order of February 7, 1983 filed. Service by mail: 3/11/83. ALLOWED: MAR 14 1983.

Mar 14 1983 Plaintiff's response to defendant's motion for enlargement of time filed. Service by mail: 3/14/83.

Mar 18 1983 Defendant's memorandum in response to Court's order of February 7, 1983 filed. Service: 3/18/83.

Mar 22 1983 Plaintiff's opposition to defendant's motion for summary judgment filed. Service: 3/22/83.

Mar 28 1983 Plaintiff's motion for leave to file defendant's answers to plaintiff's first set of interrogatories filed. Service: 3/28/83. ALLOWED: APR 8 1983; see Judge's order filed this date.

Mar 30 1983 Plaintiff's reply to defendant's memorandum in response to Court's order of February 7, 1983 filed [by leave of the Judge]. Service: 3/28/83.

Mar 31 1983 Judge's order scheduling oral argument filed. Copy to parties.

Apr 5 1983 Defendant's motion for extension of time (to April 12, 1983) to file its reply brief filed. Service by mail: 4/5/83. ALLOWED as unopposed: APR 6 1983.

Apr 8 1983 Plaintiff's motion for leave to file defendant's supplemental response to plaintiff's first set of interrogatories filed. Service by mail: 4/7/83. ALLOWED: APR 8 1983; see Judge's order filed this date.

Apr 8 1983 Judge's order filed. Copy to parties.

Apr 8 1983 Plaintiff's first set of interrogatories to defendant filed. Service: 3/22/83.

Apr 8 1983 Defendant's supplemental response to plaintiff's first set of interrogatories filed. Service by mail: 4/1/83.

Apr 12 1983 Defendant's reply brief in support of motion for summary judgment filed. Service by mail: APR 12 1983.

Apr 12 1983 Defendant's motion for leave to file response to statement of "genuine issues" filed. Service by mail: APR 12 1983. ALLOWED: APR 14 1983.

Apr 14 1983 Defendant's response to plaintiff's statement of "genuine issues" filed. Service by mail: APR 12 1983.

Apr 27 1983 Transcript of proceedings (1 volume) taken at Washington, D.C. on April 7, 1983 filed. Notice to parties.

May 6 1983 Notice to counsel filed by Chief Judge. Copy to parties.

May 13 1983 Order allowing defendant's motion to withdraw its motion for summary judgment [made orally in hearing], setting case for trial, and affording counsel to May 23, 1983 to invoke optional procedures for complex cases, etc. filed. Copy to parties.

May 26 1983 Plaintiff's motion for protective order filed. Service by mail: 5/26/83. ALLOWED. SEE ORDER ENTERED JUN 13 1983.

May 31 1983 See 320-83 T for motion to consolidate. ALLOWED: JUN 1 1983.

May 31 1983 See 351-83 T for motion to consolidate. ALLOWED: JUN 1 1983.

Jun 3 1983 Order governing proceedings before trial filed in 351-83T. Copy to parties.

Jun 6 1983 Transcript of proceedings (1 volume) taken at Washington, D.C. on May 12, 1983 filed. Notice to parties.

Jun 7 1983 Defendant's response to plaintiff's motion for protective order filed. Service by mail: 6/6/83.

Jun 13 1983 Order re: status hearing, allowance of motion for protective order, and pretrial conference filed. Copy to parties.

Jun 14 1983 Protective order filed by the Chief Judge. Copy to parties.

Jul 5 1983 Transcript of proceedings (1 volume) taken at Washington, D.C. on June 8, 1983 filed. Notice to parties.

Jul 8 1983 Judge's order amending order governing proceedings, etc. filed. Copy to parties. [No discovery to be taken after September 17, 1983.

Jul 15 1983 Plaintiff's motion for leave to amend its complaint filed. Service: 7/15/83. ALLOWED: JUL 18 1983.

Jul 18 1983 Defendant's motion to compel production of documents filed. Service: 7/15/83. Resolved at hearing held on July 28, 1983. SEE ORDER ENTERED JUL 29 1983.

Jul 18 1983 Defendant's answer filed in 320-83T. Service: 7/18/83.

Jul 18 1983 Plaintiff's first amendment to the complaint filed. Service: 7/15/83.

Jul 21 1983 Order of the Chief Judge in re deposition of Russell Siders filed. Copy to parties.

Jul 25 1983 Defendant's motion for an order permitting depositions of experts or, alternatively, for an order relating to the scope of certain depositions filed. Service: 7/22/83. Resolved at hearing held on July 28, 1983. SEE ORDER ENTERED JUL 29 1983.

Jul 28 1983 Defendant's answer to first amendment to complaint filed. Service by mail: 7/28/83.

Jul 29 1983 Judge's order re hearing held on July 28, 1983, and cancelling hearing for August 4, 1983 filed. Copy to parties.

Aug 1 1983 Defendant's answer filed in 351-83 T. Service by mail: 8/1/83.

Aug 2 1983 Transcript of proceedings (1 volume) taken at Washington, D.C. on July 5, 1983 filed. Notice to parties.

Aug 8 1983 Transcript of proceedings (1 volume) taken at Washington, D.C. on July 21, 1983 filed. Notice to parties.

Aug 9 1983 Transcript of proceedings (1 volume) taken at Washington, D.C. on July 28, 1983 filed. Notice to parties.

Aug 10 1983 Joint motion of OMAHA FINANCIAL LIFE INSURANCE COMPANY and UNITED OF OMAHA LIFE INSURANCE CO. to quash subpoenas for deposition and production of documents and for protective order filed [by leave of the Judge]. Service by mail: 8/9/83. DENIED: SEE ORDER OF AUGUST 15, 1983.

Aug 15 1983 Chief Judge's order denying the joint motion of Omaha Financial Life Insurance Company and United of Omaha Life Insurance Company to quash subpoenas for deposition and production of documents and for protective order filed. Copy to parties and United of Omaha Insurance Co. and Omaha Financial Life Insurance Co.

Aug 26 1983 Transcript of proceedings (1 volume) taken at Washington, D.C., on August 11, 1983, filed. Notice to parties.

Aug 29 1983 Defendant's motion for a protective order filed. Service: 8/26/83.

Aug 29 1983 Defendant's motion to compel filed. Service: 8/29/83. [contains IN CAMERA information]

Sep 9 1983 Plaintiff's opposition to defendant's motion for protective order filed. Service: 9/9/83.

Sep 12 1983 Objection of Edward E. Murphy, Jr. to subpoena duces tecum dated September 6, 1983 filed [by leave of the Judge]. Service by mail: 9/9/83.

Sep 12 1983 Plaintiff's opposition to defendant's motion to compel filed. Service: 9/12/83.

Sep 13 1983 Defendant's second motion for an order permitting deposition and other discovery of experts filed. Service: 9/13/83. SEE ORDER ENTERED SEP 21 1983.

Sep 15 1983 Plaintiff's opposition to defendant's second motion for an order permitting deposition and other discovery of experts filed. Service: 9/15/83.

Sep 19 1983 Motion fo [sic] BENEFICIAL STANDARD LIFE INSURANCE COMPANY for protective order filed. Service: 9/19/83. SEE ORDER ENTERED OCT 17 1983.

Sep 21 1983 Response to plaintiff to objection of Edward E. Murphy, Jr. to subpoena duces tecum dated September 6, 1983 filed [by leave of the Judge]. Service by mail: 9/21/83 (re: Murphy); service: 9/21/83.

- Sep 21 1983 Order of the Chief Judge allowing each party to depose the expert witnesses of the opposing party, etc., and except as provided re: depositions, directing that no further motions regarding discovery will be entertained by the court, filed. Copy to parties.
- Sep 28 1983 Motion for protective order filed by Continental American Life Insurance Company, Fireman's Fund Insurance Company, National Home Life Assurance Company of New York, National Home Life Assurance Company, and Life Insurance Company of North America. Service: 9/28/83. SEE ORDER ENTERED OCT 17 1983.
- Oct 3 1983 Transcript of proceedings (1 volume) taken at Washington, D.C. on September 16, 1983 filed. Notice to parties.
- Oct 3 1983 Plaintiff's response to motion for protective order (filed 9/28/83) filed. Service: 10/3/83.
- Oct 4 1983 Plaintiff's motion for extension of time (to October 5, 1983) to file memorandum re stipulations filed. Service: 10/4/83. ALLOWED: OCT 4 1983.
- Oct 4 1983 Plaintiff's motion for a protective order for use at trial filed. Service: 10/4/83. SEE ORDER ENTERED OCT 17 1983.
- Oct 4 1983 Plaintiff's memorandum of contentions of fact and law, etc. filed. Service: 10/4/83.
- Oct 4 1983 Plaintiff's exhibit list filed. Service: 10/4/83.
- Oct 4 1983 Plaintiff's witness list filed. Service: 10/4/83.

- Oct 5 1983 Defendant's witness list, defendant's exhibit list, and defendant's memorandum of contentions of fact and law (in two volumes) totaling four separate items, filed [by leave of the Judge], and placed IN CAMERA. Service by mail in re: all items: 10/4/83.
- Oct 5 1983 Defendant's motion for extension of time (to October 6, 1983) to file memorandum re stipulations pursuant to amended order governing proceedings, etc. filed. Service: 10/5/83. GRANTED: OCT 6 1983.
- Oct 6 1983 Defendant's motion to substitute modified contentions of law and fact with attached memorandum of contentions of law and fact filed, and placed IN CAMERA. GRANTED: OCT 6 1983.
- Oct 6 1983 Joint memorandum re stipulations submitted pursuant to AOGPBT ¶VI filed.
- Oct 6 1983 Joint memorandum re stipulations submitted pursuant to AOGPBT ¶VI filed in 163-83T.
- Oct 6 1983 Joint memorandum re stipulations submitted pursuant to AOGPBT ¶VI filed in 190-83T.
- Oct 6 1983 Joint memorandum re stipulations submitted pursuant to AOGPBT ¶VI filed in 320-83T.
- Oct 6 1983 Joint memorandum re stipulations submitted pursuant to AOGPBT ¶VI filed in 351-83T.
- Oct 7 1983 Plaintiff's motion to strike portions of defendant's witness list filed. Service: 10/7/83. OCT 17 1983: ALLOWED as to individual insured only.

Oct 7 1983 Plaintiff's motion to strike defendant's exhibit list filed. Service: 10/7/83.

Oct 7 1983 Defendant's motion for leave to file attachments to stipulation out of time filed. Service: 10/7/83. ALLOWED: OCT 11 1983.

Oct 11 1983 Supplemental joint memorandum re stipulations, together with Exhibits 1337, 1338, 1339, 1340, 1341, 398, 2, 187, and 188 filed by plaintiff [by leave of the Judge]. Service: 10/7/83. [Note: Defendant's Exhibit 1338 "protected" and placed IN CAMERA.]

Oct 17 1983 Order governing proceedings at trial filed. Service made by Judge.

Oct 17 1983 Protective order for use at trial filed. Service made by Judge.

Oct 19 1983 Order of the Chief Judge allowing defendant to issue subpoenas requiring attendance at trial to individuals listed on its witness list filed. Copy to parties.

Oct 25 1983 Second supplemental joint memorandum re stipulations filed.

Oct 28 1983 Motion of Continental American Life Insurance Company, Fireman's Fund Insurance Company, Fireman's Fund Life Insurance Company, National Home Life Assurance Company of New York, National Home Life Assurance Company, and Life Insurance Company of North America to vacate order, or in the alternative, to quash subpoenas filed [by leave of the judge]. Service by mail: 10/26/83. MOOT: NOV 1 1983.

Nov 4 1983 Plaintiff's memorandum of law filed [by leave of the judge]. Service: 11/4/83.

Nov 15 1983 Order of the Chief Judge scheduling status hearing filed. Copy to parties.

Dec 23 1983 Transcript and exhibits filed. Notice to parties. [See complete listing attached to page 6].

Jan 19 1984 Transcript of proceedings [1 volume] taken at Washington, D.C. on December 21, 1983 filed. Notice to parties.

Jan 31 1984 Chief Judge's opinion directing parties to file a stipulation setting forth the amount of plaintiffs' judgment in Nos. 465-82T and 320-83T by 12:30 p.m. on February 2, 1984, and directing the clerk to enter judgment in those cases and dismissing the complaints in 163-83T, 190-83T, and 351-83T, with costs to the prevailing party in each case filed [in this, 163-83T, 190-83T, 320-83T, and 351-83T]. Copies to parties.

Feb 2 1984 Stipulation re judgment amounts filed by deft. Service: 2/2/84.

Feb 2 1984 Judgment entered for plaintiff in case No. 465-82T in the amount of \$6,912,074.85 in unrelated business income tax and assessed interest previously collected, plus statutory interest; for the plaintiff in 320-83T in the sum of \$19.00 plus statutory interest; and dismissing the complaints in case Nos. 163-83T, 190-83T, and 351-83T, pursuant to the opinion of Jan 31 1984 and the stipulation re judgment amounts filed on Feb 2 1984. Copy to parties.

- Feb 2 1984- Certified transcript of judgment forwarded to attorney of record [in this, 163-83T, 190-83T, 320-83T and 351-83T]. See correspondence in file.
- Feb 10 1984 Plaintiff's motion that certain pages of the transcript and certain exhibits be marked "Protected Information" and filed under seal, filed. Service: 2/10/84. ALLOWED: FEB 15 1984.
- Feb 21 1984 Joint preliminary status report filed *nunc pro tunc* 6/8/83.
- Mar 9 1984 Plaintiff's motion to correct transcript filed. Service: 3/9/84. WITHDRAWN; SEE ORDER ENTERED APR 5 1984.
- Mar 19 1984 Defendant's response to plaintiff's motion to correct transcript filed. Service by mail: 3/19/84. WITHDRAWN; SEE ORDER ENTERED APR 5 1984.
- Mar 30 1984 Notice of appeal filed by defendant. Copy to plaintiff and C.A.F.C.
- Apr 2 1984 Notice of appeal filed by plaintiffs in cases 163-83T, 190-83T, 320-83T, and 351-83T. Copy to defendant and C.A.F.C. [\$70.00 fee paid.]
- Apr 4 1984 Stipulation re correction of transcript filed by the parties.
- Apr 5 1984 Order of the Chief Judge approving the stipulation re correction of the transcript, etc. filed. Copy to parties.

In the United States Claims Court

No. 163-83T

FREDERICK D. TURNER AND
MARGARET S. TURNER, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Mar 21 1983	Filing fee of \$60 paid by plaintiffs.
Mar 21 1983	Notice of assignment to Chief Judge Alex Kozinski filed. Copy to parties.
Mar 21 1983	Plaintiff's notice of related case [465-82T] filed.
Apr 11 1983	Order governing proceedings before trial filed. Copy to parties.
May 16 1983	Plaintiffs' motion to consolidate with case no. 465-82T filed. Service: 5/16/83. ALLOWED: MAY 31 1983.
May 20 1983	Defendant's answer filed. Service by mail: MAY 20 1983.
May 25 1983	Defendant's response to plaintiffs' motion to consolidate filed. Service by mail: 5/25/83.
May 26 1983	Plaintiffs' reply memorandum in support of motion to consolidate filed. Service: 5/26/83.
May 31 1983	SEE CASE NO. 465-82T FOR FURTHER PROCEEDINGS.

In the United States Claims Court

No. 190-83T

ARTHUR M. SHERWOOD AND
KAREN H. SHERWOOD, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Mar 29 1983	Filing fee of \$60 paid by plaintiffs.
Mar 29 1983	Plaintiffs' notice of related case [465-82T and 163-83T] filed.
Mar 29 1983	Notice of assignment to Chief Judge Alex Kozinski filed. Copy to parties.
Apr 11 1983	Order governing proceedings before trial filed. Copy to parties.
May 16 1983	Plaintiffs' motion to consolidate with case no. 465-82T filed. Service: 5/16/83. ALLOWED: MAY 31 1983.
May 25 1983	Defendant's answer filed. Service: 5/25/83.
May 25 1983	Defendant's response to plaintiffs' motion to consolidate filed. Service by mail: 5/25/83.
May 26 1983	Plaintiffs' reply memorandum in support of motion to consolidate filed. Service: 5/26/83.
May 31 1983	SEE CASE NO. 465-82T FOR FURTHER PROCEEDINGS.

In the United States Claims Court

No. 320-83T

FREDERICK G. BOYNTON, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
May 18 1983	Filing fee of \$60 paid by plaintiff.
May 18 1983	Notice of assignment to Chief Judge Alex Kozinski filed. Copy to parties.
May 18 1983	Plaintiff's notice of related case [465-82T] filed.
May 24 1983	Order governing proceedings before trial filed. Copy to parties.
May 31 1983	Plaintiff's motion to consolidate this with Case No. 465-82T filed. Service: 5/31/83. ALLOWED: JUN 1 1983.
Jun 1 1983	See 465-82T for further proceedings.

In the United States Claims Court

No. 351-83T

HERBERT C. BROADFOOT, II AND
NANCY L. BROADFOOT, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
May 31 1983	Filing fee of \$60 paid by plaintiffs.
May 31 1983	Plaintiffs' notice of related case filed.
May 31 1983	Notice of assignment to Chief Judge Alex Kozinski filed. Copy to parties.
May 31 1983	Plaintiffs' motion to consolidate this with Case No. 465-82T filed. Service: 5/31/83. ALLOWED: JUN 1 1983.
Jun 1 1983	See 465-82T for further proceedings.

United States Court of Appeals for the Federal Circuit

No. 84-988

AMERICAN BAR ENDOWMENT, PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
April 10, 1985	7. Appellant's citation of add'l authority, received. (Circulated to panel 4/15/85) (ejc)
April 15, 1985	8. Appellee's response to appellant's citation of additional authority, rec'd. & circulated to the panel. (scg)
May 10, 1985	Affirmed in part, reversed and remanded in part. Davis, J. (84-988 is affirmed; 84-1000 is reversed & remanded.)
May 23, 1985	9. Appellant's Bill of Costs, filed. (rs) ALLOWED: 6/6/85 for \$1842.95
June 6, 1985	MANDATE ISSUED TO THE MSPB. (rs)
	FUTURE ENTRIES WILL REFER TO THE PARTY DESIGNATION & PAPERS IN 84-1000
July 15, 1985	10. Appellee's motion to recall mandate or stay proceedings, filed (SD-7/15-H). (bam) STAY GRANTED: 7/17/85 to & until August 9, 1985; If Solicitor Gen.

has determined by that date to seek a petition for certiorari, the stay will continue until the filing & disposition of the petition; if the Solicitor Gen. has not so determined by that time, the stay will expire on that date unless further extended by Claims Court or this Court. (This action is only filed in 84-1000 Turner v. U.S.).(bam)

- July 19, 1985 11. Appellants' request for reconsideration of the motion of the U.S. in 84-1000 to recall mandate or stay proceedings below, filed. (SD-7/19-H) (ejc)
- July 24, 1985 Called Bob Pomerance Re: response to request for reconsideration of the motion of the U.S. in 84-1000 to recall mandate or stay proceedings below. DOJ was not served a copy of request. Sent copy 7/24. DOJ will call to inform court whether or not a response to the request will be filed. Call #28 when DOJ calls. (amm)
- July 29, 1985 12. United States' opposition to motion for reconsideration of stay of proceedings below for Appeal No. 84-1000, filed. (SD-7/26-M) (ejc)
- July 30, 1985 13. Court has affirmed the original stay of the Court entered on July 17, 1985, for appeal No. 84-1000. (bam)
- July 31, 1985 CHIEF JUSTICE SIGNED AN ORDER EXTENDING THE TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO & INCLUDING October 7, 1985.(bam)

- August 14. Letter from appellant in re the filing of petition for writ of certiorari to the Supreme Court, received. (ejc) (for Appeal 84-1000)
- Oct. 7, 1985 PETITION FOR CERTIORARI FILED IN APPEAL # 85-599, IN THE SUPREME COURT. (scg) (GRANTED: Dec. 2, 1985.) scg

**United States Court of Appeals
for the Federal Circuit**

No. 84-1000

FREDERIC D. TURNER, ET UX.,
ARTHUR SHERWOOD, ET UX, ET AL., APPELLANTS

v.

THE UNITED STATES, APPELLEE

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
April 9, 1984	1. Certificate of interest filed by appellant. (bam)
April 11, 1984	2. Joint motion to consolidate this with Appeal No. 84-988 (with proposed briefing schedule and request to file deferred appendix under Rule 30(c) filed. (ejc) GRANTED: 4/12/84. (bam)

CONSOLIDATED
SEE 84-988 FOR FUTHER
ENTRIES.

Oct. 7, 1985	PETITION FOR CERTIORARI FILED IN THE SUPREME COURT; APPEAL NO. 85-599. (scg) (GRANTED: DEC. 2, 1985) scg
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In the United States Court of Claims

Docket No. 465-82T

AMERICAN BAR ENDOWMENT, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

PETITION

(Filed: September 16, 1982)

*To the Honorable Judges of the United States Court of
Claims:*

Plaintiff, the American Bar Endowment ("the Endowment"), brings this action and respectfully alleges to this Honorable Court and says:

I

Jurisdiction

1.

This is an action arising under the internal revenue laws of the United States and is brought pursuant to section 1491 of Title 28 of the United States Code as amended.

II.

Refund Claimed

2.

This action is brought for the recovery of the following amounts of unrelated business income tax and interest thereon collected from the Endowment for its fiscal years

ended June 30, 1979, 1980, and 1981, together with statutory interest thereon as provided by law:

<u>Year</u>	<u>Tax</u>	<u>Assessed Interest</u>	<u>Total</u>
1979	\$1,587,924.00	None assessed at time claim filed	\$1,587,924.00
1980	2,326,774.00	\$376,363.66	2,703,137.66
1981	2,105,709.00	None assessed at time claim filed	2,105,709.00
	\$6,020,407.00	\$376,363.66	\$6,396,770.66

3.

The Endowment asserts that it had no unrelated business income during the taxable years here involved and that the Commissioner of Internal Revenue ("the Commissioner") erred in classifying as unrelated business income funds received by the Endowment as contributions from members participating in its group insurance programs.

III.

Identity and Tax Status of Plaintiff

4.

The American Bar Endowment is a charitable corporation organized in 1942 under the laws of the State of Illinois with its principal office in Chicago, Illinois. All members of the American Bar Association ("ABA"), a professional association exempt from Federal income taxation under sections 501(a) and 501(c)(6) of the Internal Revenue Code of 1954, are, by virtue of their membership in the ABA, members of the Endowment.

5.

The Endowment was organized and has been operated for the purpose of receiving gifts, devises and contributions to be used for educational and charitable purposes in the field of law.

6.

The Endowment has to date made grants of over \$50 million for charitable work in the field of law, funding a large and diverse group of research, educational and other public service activities. In its fiscal years 1979, 1980, and 1981, the Endowment awarded grants in the following amounts:

<u>Year</u>	<u>Amount</u>
1979	\$3,602,462.00
1980	4,397,619.00
1981	4,640,000.00

The grant recipients included the American Bar Foundation, the ABA Fund for Public Education, the Institute of Judicial Administration, the Institute for Court Management, the National College of District Attorneys, the National Council of Juvenile and Family Court Judges, the National College of Criminal Defense Lawyers, the National Institute for Trial Advocacy, and the National Legal Aid and Defender Association.

7.

By letters dated March 30, 1944 and October 7, 1948, the Commissioner ruled that the Endowment was a charitable organization exempt from tax under section 101(6) of the Internal Revenue Code of 1939. The Endowment retains such status under section 501(c)(3) of the Internal Revenue Code of 1954, Title 26 of the United States Code, as amended ("the Code"). This status was reaffirmed in a technical advice memorandum issued by the National Office of the Internal Revenue Service on July 3, 1980.

IV.

Sources of Charitable Funds

8.

The Endowment has three sources of charitable funds, namely, individual gifts and bequests, investment of cash reserves, and contributions from members participating in its group insurance programs. Most of the grant funding capability of the Endowment is attributable to contributions from members participating in the group insurance programs.

9.

In the early 1950's, leaders of the ABA conceived the idea that providing group life insurance coverage for members could be a means of obtaining contributions from members to the Endowment for charitable and educational activities in the field of law. In furtherance of this goal, the Endowment's Board of Directors executed in 1955 a group life insurance contract with New York Life Insurance Company ("New York Life") insuring the lives of eligible members of the Endowment who elected to participate in the insurance program. Initially, only group life insurance coverage was available; the scope of coverage was broadened over time so that different types of insurance coverage were offered to members, including disability income, in-hospital indemnity, major medical, and accidental death and dismemberment coverage. The amounts of life insurance coverage that members could secure were also increased over the years and dependents' coverage was added.

10.

The Endowment is the group policyholder for each of its insurance programs. Each member who enrolls in a program makes a premium contribution to the Endow-

ment which in turn pays the gross premium for the program to the insurer. At the time of enrollment, each member agrees and acknowledges that any "dividends to the policyholder" apportioned to the life insurance program by New York Life, or "experience credits" paid on the other group policies by Mutual of Omaha Insurance Company ("Mutual of Omaha"), the insurance carrier for all programs other than life, will be paid to the Endowment.

11.

The receipt by the Endowment of dividends to policyholders and experience credits (hereinafter collectively referred to as ("premium refunds")) reduced *pro tanto* the cost of insurance provided to the members of the Endowment.

12.

In each of its fiscal years 1979, 1980, and 1981, the Endowment received the following aggregate amounts of premium refunds from New York Life and Mutual of Omaha:

<u>Year</u>	<u>Amount</u>
1979	\$5,132,662.00
1980	6,758,341.00
1981	6,860,190.00

13.

In each of the years 1979, 1980, and 1981, after receipt of premium refunds from New York Life and Mutual of Omaha, the Endowment, in accord with its customary practice, mailed a notice informing each insured member of the percentage of his or her premium contribution for the prior year that constituted the member's charitable contribution to the Endowment. In determining the percentages for each year that constituted charitable con-

tributions, the Endowment deducted its expenses of operation allocable to the administration of its insurance programs, as well as certain other expenses, from the premium refunds received from New York Life and Mutual of Omaha.

V.

Contributions by Members

14.

The central feature of the Endowment's group insurance programs is an agreement and understanding between the Endowment and its insured members that the premium refunds are to be retained by the Endowment and (after reimbursement of Endowment expenses) used for charitable purposes in the field of law, rather than returned to members or applied for their financial benefit. Each of the Endowment's group insurance programs was adopted and has been operated by it with the objective and expectation that a substantial percentage of the premium contributions received from members would be returned to the Endowment as premium refunds. But for this charitable feature of the programs, group insurance could have been made available to the members by the ABA with substantially reduced payments by the members.

15.

By making premium contributions to the Endowment and by foregoing the advantage of having premium refunds returned to them or applied for their financial benefit (after reimbursement of Endowment expenses), the insured members made contributions or gifts to the Endowment. These contributions or gifts did not constitute income to the Endowment within the meaning of the Code.

16.

The amount of the premium contributions furnished by insured members and paid by the Endowment as gross premiums to New York Life and Mutual of Omaha was substantially above the fair market value of the group insurance obtained.

17.

The value of group insurance obtained by the insured members can fairly be measured by the amount of the gross premium paid by the Endowment to the insurance company for the insurance plus the administrative expenses of the Endowment attributable to the group insurance program, less the amounts returned by the insurance company to the Endowment as premium refunds, or, otherwise stated, by the net amount of the premium paid to the insurer for the group insurance plus the attributable administrative expenses of the Endowment. The excess of the gross premium over the value of the group insurance determined in this manner represented the charitable contribution to the Endowment by insured members.

18.

During its fiscal years 1979, 1980, and 1981, in accord with the Endowment's customary practices, payments by insured members for participation in the group insurance programs were solicited by the Endowment with the assurance to members that these payments would be transmitted in full to the respective insurers and that amounts returned as premium refunds would be applied, after deduction of attributable expenses, to charitable purposes in the field of law. The Endowment has always applied such funds in accord with its commitment to its members. The Endowment never retained under a claim of right premium contributions received from members or

premium refunds received from insurers; to the contrary, such funds were restricted as to use or disposition. Thus, the receipt and retention of premium refunds did not constitute income to the Endowment.

VI.

The Operation of the Group Insurance Programs

19.

The Endowment operated its group insurance programs during its fiscal years 1979, 1980, and 1981, for the sole purpose of securing contributions from its members for its educational and charitable purposes in the field of law. The Endowment does not receive any income from the sale of goods, nor from the performance of services. The administration of the voluntary group insurance programs by the Endowment was not designed or conducted as a commercial or competitive business undertaking.

20.

The Endowment's voluntary group insurance programs do not compete, and have never competed, with commercial insurance companies. The Endowment does not operate as an insurance agent or broker in competition with commercial insurance brokers. Neither New York Life nor Mutual of Omaha has paid any compensation to the Endowment for its administration of the group insurance programs, or for any other reason. During all relevant periods the insurance broker for each of the group policies was a licensed insurance brokerage firm whose compensation was regularly paid on a commission basis by New York Life and Mutual of Omaha. The only activity engaged in by the Endowment with respect to its group insurance programs was in its capacity as group policyholder.

21.

The Endowment did not carry on an unrelated trade or business in any of its fiscal years 1979, 1980, or 1981. The Endowment did not receive unrelated business income in any of these years. Premium refunds received and retained by the Endowment in each of these years did not constitute income to the Endowment.

22.

Alternatively, only a small portion of the premium refunds received and retained by the Endowment in each of its fiscal years 1979, 1980, and 1981 could be deemed to constitute unrelated business income to the Endowment. Such portion could not exceed an amount sufficient to pay the Endowment a reasonable commercial charge for any services it rendered in connection with its insurance programs. The Endowment deducted from premium refunds each year all expenses attributable to its group insurance programs (and certain other expenses) before determining the amounts constituting charitable contributions from its insured members. The amounts deducted by the Endowment for such expenses were not less than and, in fact, exceeded a reasonable commercial charge (including a reasonable profit) for all services rendered by the Endowment in connection with its group insurance programs. Thus, no additional amounts should be attributed to the Endowment as income.

VII.

Assertion and Payment of Deficiencies

23.

On February 25, 1972, the National Office of the Internal Revenue Service issued a technical advice memorandum setting forth its determination that the Endowment's

activities in connection with its group insurance programs did not constitute an unrelated trade or business within the meaning of section 513 of the Code and that the Endowment's receipt of premium refunds was not subject to the unrelated business income tax imposed by section 511 of the Code. This determination of the Internal Revenue Service was reiterated in a technical advice memorandum issued on January 30, 1973 as a substitute for the February 25, 1972 technical advice memorandum.

24.

Despite its favorable opinions of February 25, 1972 and January 30, 1973, the National Office of the Internal Revenue Service issued a technical advice memorandum on July 3, 1980, which reversed the 1973 technical advice memorandum and determined that the Endowment's activities in connection with its group insurance programs constituted an unrelated trade or business, and that premium refunds received by the Endowment were gross income from an unrelated trade or business.

25.

The Commissioner caused the Endowment's returns for its fiscal years 1979 and 1980 to be audited and, as a result of such audits, asserted against the Endowment unrelated business income tax deficiencies for such years, which were paid to the Internal Revenue Service as follows:

	<u>1979</u>	<u>Date Paid</u>	<u>1980</u>	<u>Date Paid</u>
Principal payments:	\$1,587,000.00	3/2/82	\$2,326,774.00	3/2/82
	\$924.00	7/8/82		
Interest payments:	—	—	\$376,363.66	7/8/82

26.

On March 2, 1982, the Endowment, which previously had filed its tax return for the 1981 fiscal year showing no tax liability, paid \$2,105,709.00 in unrelated business income tax to the Internal Revenue Service. Such amount was computed on the same basis as that used in computing the alleged deficiencies for 1979 and 1980. No interest had been assessed on that payment at the time of filing the claim for refund for 1981 on which this petition is based.

VIII.

Filing and Disallowance of Claim for Refund

27.

On July 15, 1982, the Endowment filed with the Director of the Regional Service Center in Kansas City, Missouri, Claims for Refund, consisting of Forms 990-T accompanied by a statement of facts and grounds upon which the refund was sought for each of its fiscal years 1979, 1980, and 1981. These claims were filed within the time prescribed by law and set forth the grounds upon which this suit is brought.

28.

On August 6, 1982 the Commissioner mailed by certified mail a notice of disallowance in full of the Claims for Refund for each of the Endowment's fiscal years 1979, 1980, and 1981. This suit is brought within the time prescribed by law.

IX.

Overpayment of Taxes

29.

For the reasons set forth herein, the Endowment has overpaid the tax imposed by section 511 of the Code for

each of its fiscal years 1979, 1980, and 1981 and there is now due and owing from the United States to the Endowment the sum of \$6,020,407.00, together with interest assessed and paid thereon in the amount of \$376,363.66, plus statutory interest thereon from the dates of payment thereof.

X.

Refund Not Made

30.

Although repayment thereof has been demanded, no part of the sum of \$6,396,770.66 has been credited, remitted, refunded, or repaid to the Endowment or to anyone on its account.

WHEREFORE, Plaintiff, the American Bar Endowment, prays for judgment in its favor against Defendant, the United States of America, in the amount of \$6,396,770.66, or such other amount as this Honorable Court may determine, together with interest thereon as provided by law from the dates of payment thereof, together with the costs of this action, and for such other relief as may to this Honorable Court seem just and proper.

Respectfully submitted,

FRANCIS M. GREGORY, JR.

In the United States Court of Claims

Docket No. 465-82T

AMERICAN BAR ENDOWMENT, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

ANSWER

(Filed: FEB 11, 1983)

Defendant, the United States, in answer to the petition in the above-captioned case, respectfully denies each and every allegation contained therein not admitted, qualified, or expressly referred to below.

Defendant further:

1-2. Admits the allegations contained in paragraphs 1 and 2.

3. Denies that the Endowment had no unrelated business taxable income for the taxable years involved. Denies that the Commissioner erred in classifying funds received as a result of the Endowment's group insurance program as unrelated business taxable income.

4. Admits the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5, except denies that plaintiff operated exclusively for these purposes.

6. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6.

7. Admits the allegations contained in paragraph 7.

8. Admits the allegations contained in paragraph 8, except denies that the amounts received by the Endowment from insurance companies constitute "contributions."

9. Admits the allegations contained in paragraph 9, except denies that American Bar Association conceived the idea of providing group insurance in order to receive "contributions."

10. Admits the allegations contained in paragraph 10, except denies that the premiums paid by insured members are in any sense "contributions."

11. Denies the allegations contained in paragraph 11.

12. Admits the allegations contained in paragraph 12 as to 1979 and 1980, except states that the plaintiff received dividends and experience credits—not premium refunds. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations concerning 1981.

13. Denies the allegations contained in paragraph 13 to the extent it suggests that the plaintiff received either contributions or premium refunds. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in paragraph 13.

14-17. Denies the allegations contained in paragraphs 14 through 17.

18. With respect to the first sentence of paragraph 18, admits that plaintiff solicited participation in the insurance program; denies that plaintiff received premium refunds; states that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in this sentence. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second and third sentences of paragraph 18. Denies the allegations contained in the fourth sentence of paragraph 18.

19. Denies the allegations contained in paragraph 19.

20. Denies the allegations contained in the first three sentences of paragraph 20. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the fourth sentence of paragraph 20. Denies the allegations contained in the fifth sentence of paragraph 20.

21. Denies the allegations contained in paragraph 21.

22. Denies the allegations contained in the first two sentences of paragraph 22. Denies the allegations contained in the third sentence to the extent it suggests that the plaintiff received either contributions or premium refunds. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in the third sentence. Denies the allegations contained in the fourth and fifth sentences of paragraph 22.

23-24. States that these paragraphs require no response. A closing agreement executed by the plaintiff on May 24, 1982, and by the Internal Revenue Service on June 15, 1982, states in part as follows:

For its fiscal years ended June 30, 1979 and June 30, 1980, Endowment will not be granted section 7095(b) relief, and Endowment agrees that neither it nor any other party which joins with it in litigation of the issues arising from its group insurance program will raise or allow to be raised either in claims for refund or in the litigation any claims for relief under section 7805(b), or any theory such as estoppel, reliance, or abuse of discretion, or any similar theory which relates to the manner in which Endowment's liability for the unrelated business income tax was determined as opposed to the merits of the tax;

25. Admits the allegations contained in paragraph 25.

26. Admits the allegations contained in the first sentence of paragraph 26. States that its attorneys presently lack

knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence. Admits the allegations contained in the third sentence of paragraph 26.

27-28. Admits the allegations contained in paragraphs 27 and 28.

29. Denies the allegations contained in paragraph 29.

30. Admits the allegations contained in paragraph 30.

WHEREFORE, defendant requests that the petition be dismissed, with all allowable costs assessed against plaintiff.

Respectfully submitted,

ROBERT E. DAVIS
Acting Assistant Attorney General

In the United States Court of Claims

Docket No. 465-82T

AMERICAN BAR ENDOWMENT, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

FIRST AMENDED ANSWER

(Filed: March 10, 1983)

Defendant, the United States, in answer to the petition in the above-captioned case, respectfully denies each and every allegation contained therein not admitted, qualified, or expressly referred to below.

Defendant further:

1-2. Admits the allegations contained in paragraphs 1 and 2.

3. Denies that the Endowment had no unrelated business taxable income for the taxable years involved. Denies that the Commissioner erred in classifying funds received as a result of the Endowment's group insurance program as unrelated business taxable income.

4. Admits the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5, except denies that plaintiff operated exclusively for these purposes.

6. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6.

7. Admits allegations contained in paragraph 7.

8. Admits the allegations contained in paragraph 8, except denies that the amounts received by the Endowment from insurance companies constitute "contributions."

9. Admits the allegations contained in paragraph 9, except denies that American Bar Association conceived the idea of providing group insurance in order to receive "contributions."

10. Admits the allegations contained in paragraph 10, except denies that the premiums paid by insured members are in any sense "contributions."

11. Denies the allegations contained in paragraph 11.

12. Admits the allegations contained in paragraph 12 as to 1979, except states that the plaintiff received dividends and experience credits—not premium refunds. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations concerning 1980 and 1981.

13. Denies the allegations contained in paragraph 13 to the extent it suggests that the plaintiff received either contributions or premium refunds. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in paragraph 13.

14-17. Denies the allegations contained in paragraphs 14 through 17.

18. With respect to the first sentence of paragraph 18, admits that plaintiff solicited participation in the insurance program; denies that plaintiff received premium refunds; states that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in this sentence. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second and third sentences of paragraph 18. Denies the allegations contained in the fourth sentence of paragraph 18.

19. Denies the allegations contained in paragraph 19.

20. Denies the allegations contained in the first three sentences of paragraph 20. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the fourth sentence of paragraph 20. Denies the allegations contained in the fifth sentence of paragraph 20.

21. Denies the allegations contained in paragraph 21.

22. Denies the allegations contained in the first two sentences of paragraph 22. Denies the allegations contained in the third sentence to the extent it suggests that the plaintiff received either contributions or premium refunds. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in the third sentence. Denies the allegations contained in the fourth and fifth sentences of paragraph 22.

23-24. States that these paragraphs require no response. A closing agreement executed by the plaintiff on May 24, 1982, and by the Internal Revenue Service on June 15, 1982, states in part as follows:

For its fiscal years ended June 30, 1979 and June 30, 1980, Endowment will not be granted section 7095(b) relief, and Endowment agrees that neither it nor any other party which joins with it in litigation of the issues arising from its group insurance program will raise or allow to be raised either in claims for refund or in the litigation any claims for relief under section 7805(b), or any theory such as estoppel, reliance, or abuse of discretion, or any similar theory which relates to the manner in which Endowment's liability for the unrelated business income tax was determined as opposed to the merits of the tax;

25. Admits the allegations contained in paragraph 25.

26. Admits the allegations contained in the first sentence of paragraph 26. States that its attorneys lack knowledge

or information sufficient to form a belief as to the truth of the allegations contained in the second sentence. Admits the allegations contained in the third sentence of paragraph 26.

27-28. Admits the allegations contained in paragraphs 27 and 28.

29. Denies the allegations contained in paragraph 29.

30. Admits the allegations contained in paragraph 30.

WHEREFORE, defendant requests that the petition be dismissed, with all allowable costs assessed against plaintiff.

Respectfully submitted,

ROBERT E. DAVIS
Acting Assistant Attorney General

In the United States Court of Claims

Docket No. 465-82T

AMERICAN BAR ENDOWMENT, PLAINTIFF,

v.

UNITED STATES OF AMERICAN, DEFENDANT.

FIRST AMENDMENT TO COMPLAINT OF PLAINTIFF AMERICAN BAR ENDOWMENT

(Filed: July 18, 1983)

The Complaint of plaintiff American Bar Endowment is amended by striking paragraphs 2, 25, 26, 27, 28, 29, and 30 and the accompanying prayer for relief, and by inserting, in lieu thereof, the following paragraphs 2, 25, 26, 27, 28, 29, and 30 and accompanying prayer for relief:

2.

This action is brought for the recovery of the following amounts of unrelated business income tax and interest thereon collected from the Endowment for its fiscal years ending June 30, 1979, 1980, and 1981, together with statutory interest thereon as provided by law:

<u>Year</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
1979	\$1,587,924.00	\$427,845.18	\$2,015,769.18
1980	2,326,774.00	376,363.66	2,703,137.66
1981	2,105,709.00	87,459.04	2,193,168.04
	\$6,020,407.00	\$891,667.88	\$6,912,074.88

25.

The Commisioner caused the Endowment's returns for its fiscal years 1979, 1980, and 1981 to be audited and, as a result of such audits, asserted against the Endowment unrelated business income tax deficiencies for such years, which were paid to the Internal Revenue Service as follows:

<u>Year</u>	<u>Principal Payment</u>	<u>Date Paid</u>	<u>Interest Payment</u>	<u>Date Paid</u>
1979	\$1,587,000.00	3/2/82	\$427,845.15	11/2/82
	924.00	7/8/82		
1980	2,326,774.00	3/2/82	376,363.66	7/8/82
1981	2,105,709.00	3/2/82	—	—

26.

On December 30, 1982, the Endowment, which previously had paid \$2,105,709.00 in unrelated business income tax for its 1981 fiscal year to the Internal Revenue Service, paid \$87,459.04 in interest on that payment. Such amount of interest was computed based on the \$2,105,709.00 in unrelated business income tax for the Endowment's 1981 fiscal year paid to, and subsequently assessed by, the Internal Revenue Service.

27.

On July 15, 1982, the Endowment filed with the Director of the Regional Service Center in Kansas City, Missouri, Claims for Refund, consisting of Forms 990-T accompanied by a statement of facts and grounds upon which the refund of tax paid for each of its fiscal years 1979, 1980, and 1981, and the refund of interest paid for its fiscal year 1980 was sought. On December 30, 1982, the Endowment filed with the Director of the Regional Service

Center in Kansas City, Missouri, Claims for Refund of interest, consisting of amended Forms 990-T accompanied by a statement of facts and grounds upon which the refund of interest paid for its fiscal years 1979 and 1981 was sought. All such claims were filed within the time prescribed by law and set forth the grounds upon which this suit is brought.

28.

On August 6, 1982, the Commissioner mailed by certified mail a notice of disallowance in full of the Claims for Refund filed on July 15, 1982. Six months have passed without final action by the Internal Revenue Service on the Claims for Refund filed on December 30, 1982. This suit is brought within the time prescribed by law.

29.

For the reasons set forth herein, the Endowment has overpaid the tax imposed by section 511 of the Code for each of its fiscal years 1979, 1980, and 1981 and there is now due and owing from the United States to the Endowment the sum of \$6,020,407.00, together with interest paid thereon in the amount of \$891,667.88, plus statutory interest thereon from the dates of payment thereof.

30.

Although repayment thereof has been demanded, no part of the sum of \$6,912,074.88 has been credited, remitted, refunded, or repaid to the endowment or to anyone on its account.

WHEREFORE, Plaintiff, the American Bar Endowment, prays for judgment in its favor against defendant, the United States of America, in the amount of \$6,912,074.88, or such other amount as this Honorable

Court may determine, together with interest thereon as provided by law from the dates of payment thereof, together with the costs of this action, and for such other relief as may to this Honorable Court seem just and proper.

Respectfully submitted,

/s/ FRANCIS M. GREGORY, JR.

Francis M. Gregory, Jr.

In the United States Court of Claims

Docket No. 465-82T

AMERICAN BAR ENDOWMENT, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

ANSWER TO FIRST AMENDMENT TO COMPLAINT OF PLAINTIFF AMERICAN BAR ENDOWMENT

(Filed: July 28, 1983)

Defendant, the United States, by its attorneys, in answer to the first amendment to plaintiff's complaint, filed in the above-entitled case, respectfully denies every allegation contained therein, not admitted, qualified, or expressly referred to below.

Defendant, in further response to the amended complaint, strikes its responses to paragraphs 2, 25, 26, 27, 28, 29, and 30 of its answer filed February 11, 1983, and substitutes therefor its responses to the amended complaint as follows:

2. Admits the allegations contained in paragraph 2.

25. Admits the allegations contained in paragraph 25, except states that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations concerning the payment of \$427,845.15 in interest for the year 1979.

26. Admits that, previous to December 30, 1982, the Endowment paid \$2,105,709 in unrelated business income tax for its 1981 fiscal year. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 26.

27. Admits the allegations contained in the first sentence of paragraph 27. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the second sentence of paragraph 27. As to the third sentence of paragraph 27, admits that the claims filed on July 15, 1982, were filed within the time prescribed by law and set forth the grounds upon which this suit is brought; states that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of paragraph 27 as they relate to the claims alleged to have been filed December 30, 1982.

28. Admits the allegations contained in the first sentence of paragraph 28. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second and third sentences of paragraph 28.

29. Denies the allegations contained in paragraph 29.

30. With respect to paragraph 30, admits that the sums of \$6,020,407 in tax and \$376,363.66 in interest have not been refunded or repaid to the Endowment or anyone in its behalf. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 30 concerning interest assessed and paid in excess of the sum of \$376,363.66.

WHEREFORE, defendant requests that the complaint be dismissed, with all allowable costs assessed against plaintiff.

Respectfully submitted,

/s/ ROBERT EDWIN DAVIS

ROBERT EDWIN DAVIS

Acting Assistant Attorney General

In the United States Court of Claims

Docket No. 163-83T

FREDERICK D. TURNER AND MARGARET S. TURNER,
PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT.

Complaint

(Filed: MAR 21, 1983)

To the Honorable Judges of the United States Claims Court:

Plaintiffs, Frederick D. Turner (SS No. 001-30-9135) and Margaret S. Turner (SS No. 055-32-8815), bring this action and respectfully allege:

I.

1.

Jurisdiction

This is action under the Internal Revenue Laws of the United States and is brought pursuant to section 1491 of Title 28 of the United States Code, as amended.

II.

2.

Refund Claimed

This action is brought for the recovery of income tax in the amount of \$25.00 collected from the plaintiffs, together with statutory interest thereon as provided by law

III.

3.

Identity of Plaintiffs

Plaintiffs are husband and wife. Frederick D. Turner (hereinafter "Plaintiff") is a partner in the Buffalo, New York law firm of Brown, Kelly, Turner, Hassett & Leach. Margaret S. Turner is Executive Director of the Buffalo, New York office of the American Lung Association.

IV.

Payment of Taxes

4.

On July 26, 1981, pursuant to extension, Plaintiffs filed a joint Federal income tax return with the Internal Revenue Service Center in Andover, Massachusetts for the year ending December 31, 1980. The 1980 return showed an income tax liability of \$21,623 which was paid as follows:

Estimated tax payments:	\$16,000
Paid with Form 4868	2,223
Withholding	2,777
With return	623

V.

5.

Plaintiff is a member of the American Bar Endowment (hereafter the "Endowment") whose by-laws provide that its membership consists of the members in good standing of the American Bar Association (hereafter the "ABA"). The Endowment is a charitable corporation exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code.

6.

Plaintiff enrolled, effective December 1, 1972, for \$20,000 of life insurance coverage under a group life insurance policy owned by the Endowment and issued by New York Life Insurance Company ("New York Life"). Before enrolling for coverage under the group life insurance policy, Plaintiff reviewed Endowment literature describing the insurance plan, its charitable purposes, and the Endowment's commitment to expend its funds for charitable work in the field of law; Plaintiff signed a statement agreeing and acknowledging that any dividends apportioned to the policy by New York Life would be paid to the Endowment.

7.

In each of the years since Plaintiff enrolled in the life insurance plan, the Endowment has received a dividend apportioned to the policy by New York Life. This dividend was the result of premium payments in the year prior to the receipt of the dividend. For all years following the first year of Plaintiff's enrollment, the Endowment, after receipt of the dividend, has mailed a notice to Plaintiff informing him of the percentage of his prior payment which constituted his charitable contribution to the Endowment.

8.

In each of the years since Plaintiff enrolled in the life insurance plan, he has paid the applicable annual premium to the Endowment. For the group life premium payment period extending from December 1, 1978 to November 30, 1979, Plaintiff paid to the Endowment a premium of \$100.00, semi-annual payments of \$50.00 being made on November 15, 1978 and May 27, 1979. For the premium payment period extending from December 1, 1979 to November 30, 1980, Plaintiff paid to the Endowment a

premium of \$100.00, semi-annual payments of \$50.00 being made on December 1, 1979 and May 5, 1980. For the premium payment period extending from December 1, 1980 to November 30, 1981, Plaintiff paid to the Endowment a premium of \$100.00, semi-annual payments of \$50.00 being made on November 4, 1980 and May 20, 1981.

9.

In 1980 Plaintiff received a written notice from the Endowment, which had received a dividend from New York Life in that year, advising that each insured member had in 1980 made a contribution to the Endowment of 49.3% of any life insurance premiums paid in the period from December 1, 1978 to November 30, 1979. In 1981 taxpayer received a similar notice from the Endowment, which had received a dividend from New York Life in that year, advising that in 1981 each insured member had made a contribution to the Endowment of 55.4% of any life insurance premiums paid in the period from December 1, 1979 to November 30, 1980.

VI.

Charitable Contribution

10.

In 1980 Plaintiffs were entitled to deduct as a charitable contribution to the Endowment for use in its charitable activities in the field of law 49.3% of life insurance premiums paid by Plaintiff in the period from December 1, 1978 to November 30, 1979.

11.

Alternatively, in 1980 Plaintiffs were entitled to deduct as a charitable contribution to the Endowment that portion of life insurance premiums paid by Plaintiff in 1980 that was returned to the Endowment subsequent to 1980 for use in its charitable activities in the field of law.

VII.

Overpayment of Taxes

12.

In filing their Federal income tax return for 1980, Plaintiffs failed to deduct as a charitable contribution within the meaning of section 170(c)(2) of the Internal Revenue Code that amount of life insurance premiums paid by Plaintiff that constituted a charitable contribution.

13.

For the reasons set forth herein, Plaintiffs have overpaid their income tax for 1980 and there is now due and owing from the defendant to the plaintiffs the sum of \$25.00 and statutory interest thereon.

VIII.

Filing and Denial of Claim for Refund

14.

On September 17, 1982, Plaintiffs timely filed with the Internal Revenue Service Center, Andover, Massachusetts, a claim for refund of income tax paid for 1980. Such claim set forth the grounds and reasons upon which this suit is brought.

15.

Six months have passed without final action by the Internal Revenue Service on Plaintiffs' claim.

* * * * *

WHEREFORE, Plaintiffs demand judgment against the Defendant, the United States of America, in the amount of \$25.00, or such other amount as this

Honorable Court may determine, together with interest thereon as provided by law from the dates of payment thereof, together with the costs of this action, and for such other relief as the Honorable Court may deem just and proper.

Respectfully submitted,

/s/ FRANCIS M. GREGORY, JR.
Francis M. Gregory, Jr.

In the United States Court of Claims

Docket No. 163-83T

FREDERICK D. TURNER AND MARGARET S. TURNER,
PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT.

Answer

(Filed: MAY 20, 1983)

Defendant, the United States, in answer to the complaint in the above-captioned case, respectfully denies each and every allegation contained therein not admitted, qualified, or expressly referred to below.

Defendant further:

1-4. Admits the allegations contained in paragraphs 1 through 4.

5. Admits the allegations contained in the first sentence of paragraph 5. With respect to the second sentence, admits that the Internal Revenue Service has ruled that the Endowment is a charitable corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code.

6. Admits the allegations contained in the first sentence of paragraph 6. With respect to the second sentence, states that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of whether, before enrolling for coverage under the group life insurance policy, plaintiff Frederick D. Turner (hereafter plaintiff) reviewed Endowment literature describing the insurance plan, its charitable purposes, and the Endowment's commitment to expend its funds for charitable

work in the field of law. Admits that plaintiff signed a statement, at the time he purchased the insurance, agreeing and acknowledging that any dividends apportioned to the policy by New York Life would be paid to the Endowment.

7. Admits the allegations contained in the first sentence of paragraph 7. Denies the allegations contained in the second sentence. Avers that the group policies issued to the American Bar Endowment are participating policies, which means that the Endowment, as group policyholder, is entitled to share in the divisible surplus of New York Life through the receipt of dividends as ascertained by New York Life. New York Life has no contractual obligation to the Endowment to pay a dividend of a particular size or to use any particular formula or factors in determining the amount of the dividend. With respect to the third sentence, defendant admits that plaintiff received notices during the taxable years ended December 31, 1974, through December 31, 1979, informing him of the percentage of his prior year's premium payment which American Bar Endowment auditors and counsel advised, in their opinion, constituted charitable contributions. Counsel advised, however, that the Internal Revenue Service had not ruled on the matter. Denies the remaining allegations contained in paragraph 7.

8. States that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8.

9. With respect to paragraph 9, defendant admits that in 1980 plaintiff received a written notice from the Endowment, which had received a dividend from New York Life in that year, advising that, in the opinion of their auditors and counsel, each insured member had in 1980 made a contribution to the Endowment of 49.3 percent of any life insurance premiums paid in the period from December 1, 1978, to November 30, 1979. Counsel, however, further

advised in the notice that the Internal Revenue Service had ruled that members were not entitled to charitable contributions for any portion of their premium payments. Defendant further admits that in 1981 plaintiff received a similar notice from the Endowment, which had received a dividend from New York Life in that year, advising that, in the opinion of the Endowment's auditors and counsel, in 1981 each insured member had made a contribution to the Endowment of 55.4 percent of any life insurance premiums paid in the period from December 1, 1979, to November 30, 1980.

10-11. Denies any allegations contained in paragraphs 10 and 11.

12. Admits the allegations contained in paragraph 12, except denies that plaintiff was entitled to a charitable contribution deduction for any portion of the life insurance premiums.

13. Denies the allegations contained in paragraph 13.

14-15. Admits the allegations contained in paragraphs 14 and 15.

WHEREFORE, defendant requests the complaint be dismissed, with all allowable costs assessed against plaintiffs.

Respectfully submitted,

/s/ ROBERT EDWIN DAVIS

ROBERT EDWIN DAVIS

Acting Assisting Attorney General

In the United States Claims Court

No. 465-82T, 163-83T, 190-83T, 320-83T, 351-83T

AMERICAN BAR ENDOWMENT, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS,
MAY 12, 1983

* * * * *

[3] THE COURT: Good morning, Mr. Sutherland. It is a real pleasure to have you here.

MR. SUTHERLAND: Thank you. It is a pleasure being here.

THE COURT: Well, this is a motion for summary judgement by the Defendant.

MR. DENNIS: Yes, Your Honor.

THE COURT: You may proceed, Mr. Dennis, or Mr. Markham; both.

MR. DENNIS: Thank you.

May it please the Court, the question presented in this case is whether the endorsement and administration of a group insurance program constitutes the business unrelated to an organization's exempt purpose under Section 511 through 513 of the Internal Revenue Code.

The Government moved for summary judgment in the incident case because it believed that there were no facts in dispute. It is our position that as matter of law, the administration and endorsement of a group insurance program constitutes the carrying on of a business unrelated to the organization's exempt purpose.

THE COURT: What exactly is that business?

MR. DENNIS: What is the business?

THE COURT: Yes. What business is that?

[4] MR. DENNIS: That they are engaged in? The Plaintiff operates as a group policy holder. In the petition, Paragraph 9, it stated that the Plaintiff provides five types of group insurance to its members.

THE COURT: So what are you saying? It is an insurance company?

(Pause)

What is the business we are talking about? Do they underwrite insurance?

MR DENNIS: They don't underwrite insurance.

THE COURT: So they are not an insurance company.

MR. DENNIS: They don't sell insurance.

THE COURT: They are not an insurance broker.

MR. DENNIS: But they endorse and administer an insurance program.

THE COURT: All right. So what then is the business? Endorser and administrator?

MR. DENNIS: Yes, and they are creating a market.

THE COURT: Market-maker?

MR. DENNIS: Yes.

THE COURT: Okay.

MR. DENNIS: For insurance.

THE COURT: Okay. So those are the relevant [5] businesses, according to you.

MR. DENNIS: Yes.

THE COURT: They are an administrator, a market-maker, and what was the third?

MR. DENNIS: And endorser of the insurance, which necessarily relates to the making of a market for insurance.

THE COURT: Endorser means —

MR DENNIS: Promote.

THE COURT: A promoter.

MR. DENNIS: Um-huh.

THE COURT: Sort of like an advertising agency.

MR. DENNIS: Yes.

THE COURT: Okay. So those are the services; that is the business in question?

MR. DENNIS: Yes. And essentially they serve as a middleman between the members and the insurance carrier.

THE COURT: Okay. Now you think that under all circumstances that would be an—that income obtained from that would be unrelated business income?

MR. DENNIS: Yes, Your Honor.

THE COURT: How do you deal with DAV? Here they were selling trinkets. DAV—Disabled American Veterans, decision by Court of Claims; they were selling [6] trinkets.

I mean, just like any other business, they went according to the opinion they were in the markets selling goods, a very easy to understand kind of business, and yet Court of Claims held that as to some of those goods, even though they were making a profit, the profit was so outrageous that it wasn't really a business and as to other of those goods, they were making a profit that was not outrageous and in that case it might be a UBIT or UBTI—UBTI—and as to those profits that were not outrageous, there had to be an apportionment.

And we just had a decision April 12th from the Circuit affirming. So why isn't this just another business making outrageous profits and therefore exempt from UBTI?

I mean, unless you are willing to concede that they are making outrageous profits, in which case I would have to give summary judgment to Plaintiffs. If you are willing to concede that, then under DAV, summary judgement would have to go the other way.

If you don't concede that they are making outrageous profits, then we have a triable issue of fact. Isn't that the standard?

MR. DENNIS: Your Honor, the only evidence before the Court concerning profits in this case is the [7] Plaintiff's own statements in the American Bar Association Journal where they state—

THE COURT: That is how trials work, you see. The Plaintiff comes in and tells the Court what it thinks and the Defendant comes in and tells the Court what it thinks. But what you are saying is there is no dispute, there is nothing to try.

And if there is nothing to try, I am going to have to believe that they are making outrageous profits like they claim and grant them summary judgement.

MR. DENNIS: They haven't attached any affidavits demonstrating they have made outrageous profits. When you are saying outrageous profits, I think that all insurance—certainly insurance—

THE COURT: We are not in the insurance business, remember.

MR. DENNIS: Yes, but the group policy holders involved in the Fourth and Fifth Circuits cases—

THE COURT: But we are not selling insurance, remember. We are providing services, according to your own statement of fact of what the business is. They are providing administrative services.

They are providing promotional services and are a market-maker. That is the service provided. They don't provide insurance and while all of us may think [8] the insurance companies make too much money—I don't know whether they do or not, but there is always suspicion of that—this is not an insurance company.

This is a provider of an administrative service according to you.

MR. DENNIS: Yes, in exactly the same capacity as the provider of services in Carolina's Farm, Fourth Circuit, Louisiana Credit, Fifth Circuit, exactly the same situation.

THE COURT: Right. Louisiana Credit rejected the DAV test, the outrageous profit test, didn't it, and as much as I respect the Fifth Circuit cannot reverse me, whereas the Federal Circuit sure can.

MR. DENNIS: But I think the analysis of the Fifth Circuit in Carolina's Farm is appropriate here. I think we have an entirely different situation than that involved in Disabled American Veterans where we are marketing trinkets.

THE COURT: Why do you think trinkets are different? I mean, if you needed a trial on trinkets, don't we need a trial in a sophisticated service like providing of administrative and group services?

MR. DENNIS: To determine whether it is operated in a commercial fashion or not?

THE COURT: Yes.

[9] MR. DENNIS: I don't think that there is any need whatsoever to determine whether the incident activity was conducted in a commercial fashion.

THE COURT: Why do you say that?

MR. DENNIS: I would just like to go through some of the responses to the request for admissions that we have received from the Plaintiffs. First of all, I would like to move that their responses be made part of the record in this case.

The Plaintiff initially disputed that our statement of undisputed facts did not relate to the period in dispute. Also —

THE COURT: Let's not talk lawyer talk. Let's talk reality. Let's not talk admissions of fact and the like. What do you think is really at issue in this case?

Why do you think that a sophisticated business like providing of administrative and managerial and promotional services which is coupled with presumably a fund-raising function is the kind of enterprise which is any more susceptible to summary judgement than the selling of trinkets by the DAV?

I guess I don't understand. Isn't this essentially the sale of a much more sophisticated service?

MR. DENNIS: Yes. Necessarily it takes on a [10] commercial nature. Indeed, in Disabled American Veterans, there is a question whether it is of a commercial nature or not. When you are sending out a letter to individuals and you are saying that we would like a contribution, and you are entitled to a charitable contribution if you make a contribution.

THE COURT: In the DAV they were canvassing the world at large. Here they are limiting their canvassing to members only. In DAV, they were saying you get the trinkets if you make a contribution.

You don't have to be a member. You just kind of buy these trinkets at an outrageous cost. Here at least let's say you buy insurance, if I understand Plaintiff's contentions exactly, you are buying insurance at a cost much above market and essentially if you are willing to make a contribution to ABE, we will let you buy insurance.

I mean isn't that economic reality?

MR. DENNIS: It is carried on in a commercial fashion, though. That is the only question that DAV asked Carolina's Farm. I note that the endorsing and administration of group insurance is necessarily carried on in a commercial fashion because —

THE COURT: What do you mean "necessarily"?

MR. DENNIS: —there is advertisement and they [11] guaranteed remuneration albeit through a third party.

THE COURT: Nobody disputes that providing of administrative services can be a business, but do you dispute that under the law of the Circuit if you carry out a business which is coupled with a promotional function and the profits you make from that business is outrageous, or much more than the services you provide are worth, that in that case you are not subject to the UBTI?

MR. DENNIS: If you find that they carried on a business, no matter how outrageous the profits are, necessarily they are subject to the UBTI.

THE COURT: How do you get away from the \$2 and \$3 donations in DAV? The Circuit said the \$2 donations were worth less than a dollar, and they were getting \$2 for the 95-cent trinkets.

The \$3 donation brought you a \$1.49 worth of trinkets, and therefore those things were not really commercial transactions. They were promotional activities and as to the \$2 and \$3 transactions, even though there was a commercial aspect to it, the profits were so great that it really was not a commercial venture.

It didn't implicate the policy concerns of the UBTI because you didn't have a real competition with destructive, unfair competition with other providers of [12] the same service in the market.

Isn't Plaintiff's claim, generously viewed, essentially a claim that this is equivalent of the \$2 or \$3 transaction and taking Plaintiff's second level claim, isn't it saying that even if it does have commercial aspects to it, there must be an apportioning as there was with respect to the \$5 transactions in DAV?

Maybe there was a service provided here but some of the excess was profit and some of the excess was a charitable contribution, so that at the very least we ought to apportion.

MR. DENNIS: The Court in DAV was trying to ascertain whether there was a business or not with respect to the solicitation of contributions through low-cost items.

The question in DAV was: do we have a business? Your statement to me is: if you have a business and they have very high profits with respect to that business, are they subject to the tax under Section 513 of the Code?

Yes, they are, automatically. There is three questions under Section 513 of the Code. One, were they in a trade or business; two, was the trade or business regularly carried on; and three, was the trade or business substantially related to the organization's exempt [13] purpose.

Those are the only considerations under Section 513 of the Code. If the Court finds all three of those criteria are met in the incident case, the Government is entitled to judgement as a matter of law.

THE COURT: Well, the primary factors considered, I am quoting from DAV, is "when the Plaintiff conducted this activity in a competitive manner". Isn't that a test?

MR. DENNIS: Yes.

THE COURT: The question is not whether you are providing a service, but whether the service you are providing is one which is provided in a competitive manner.

Now, if—

MR. DENNIS: In order to determine whether they were in a business, and you are already agreeing that the Plaintiff was in a business, that the activities of the Plaintiff constituted a business.

THE COURT: Mr. Dennis, you have it turned around. I am the Judge. I am not a party. I don't agree or disagree to anything.

MR. DENNIS: I'm sorry. Your question to me, Your Honor, was if they are in a business.

[14] THE COURT: They are in an enterprise. They are doing something. The question is whether or not, according to the test in DAV, whether or not they are doing it in a commercial fashion.

And if I understand Plaintiff's claim, they are just saying we are making such outrageous profits and we are getting such outrageous returns from the ABE, from the insurance companies, that whatever service we are providing is merely a vehicle for the raising of contributions.

This is just the way—

(Pause)

Another thing about this, and that is these are very sophisticated little enterprises we are dealing with. First of all we are dealing with economics of charitable organizations.

And there are all sorts of ways to get your people to dig into their pockets. One of them is called fool them. You get them to dig their hands into their pockets by offering them some service which they may or may not otherwise need and then while they have their hands in their pocket, they reach in and give a little more.

That was the \$2 and \$3 trinkets in DAV. You are in your pocket anyway; why don't you pull out more, [15] much more, than the service is worth. So what the service is really being used for is not necessarily to make a profit on the service itself, but is a way of prying open the pocket.

So when you have the pocket open, you can get them to pull out a little more. But you are also dealing with insurance, a very sophisticated business, isn't it?

MR. DENNIS: Yes.

THE COURT: What you have is group insurance, right, which is different from individual insurance. You have insurance companies vying for the service, the ability to capture a group as its market.

On the other hand, you have members who would like to be members of a group who perhaps want to buy insurance at group rates. How can I really on the basis of summary judgement motions assess where in this very sophisticated little set of transactions this particular activity fits in?

MR. DENNIS: Well, I think the first way to approach the problem is to consider that with respect to the unrelated business tax, there is really two separate questions.

THE COURT: Okay.

MR. DENNIS: The first question is one of [16] liability under Section 513 and the second question is one of the amount of income under Section 512 of the Code.

THE COURT: Right.

MR. DENNIS: If you look at the liability question under Section 513, there is three questions that are presented under Section 513.

THE COURT: Right.

MR. DENNIS: First of all, did the Plaintiff engage in a business, a trader [*sic*] business.

THE COURT: Right.

MR. DENNIS: Secondly, was that—

THE COURT: And we know that you can make money selling things and still not engage in a trader [*sic*] business. The way we know that is the Court of Claims has told us that, don't we?

(Pause)

DAV said you can sell things in the market and still not engage in a trader [*sic*] business.

MR. DENNIS: Yes, if it is not carried on in a commercial—

THE COURT: Wait a minute. Let's take it in small increments. You can be selling something and still not be a trader [*sic*] business, okay? Now—

MR. DENNIS: I don't know if you can be selling [17] something. Selling necessarily takes on a trader [*sic*] business connotation. I think that you can be offering a low-cost item in exchange and not be in a trader [*sic*] business, but I don't know if I would go so far as to say that they are selling.

If you find selling, I think that you would be in a trader [*sic*] business.

THE COURT: All right. Well, let's not use the word "selling" if you feel uncomfortable with it. You can engage in the exchange of a good or service for money, quid pro

quo, and do essentially what a noncharitable organization would be doing if they were selling things: you give something and you get something in return.

And if you make enough money on it, if you just make enough money on it, if your profits are just outrageous enough, then you are not really engaging in a trader [*sic*] business.

The Circuit has said that, and the Court of Claims has.

MR. DENNIS: I think you have to look at that decision concerning the amount of money that has been made in light of the items being sold. I think that with the endorsement and administration of a group insurance policy, I think you have an entirely [18] different question.

There we obviously have a business; obviously the Plaintiff is creating a market for its insurance. It extensively advertised. It was guaranteed a profit.

THE COURT: But again it is not an insurance company. They are a provider of a service.

MR. DENNIS: Yes, it is a middleman. As the Tax Court, as the Fourth Circuit in Carolina's Farm, as the Fifth Circuit in Louisiana Credit, all held it is a middleman.

It is creating a market as a group policyholder. And that necessarily constitutes a business.

THE COURT: It doesn't necessarily constitute a business. If you are selling a service, a middleman service, at such outrageous rates that is not a commercial venture, why isn't it just like selling trinkets in DAV?

You have this middleman service that you can provide. You don't provide it at commercial rates. You don't provide it competitively with anybody else. You provide it at outrageous rates.

It is a way of prying open the pocket.

MR. DENNIS: It is the Government's position that when you are just focusing on the business question—

THE COURT: You don't like DAV.

[19] MR. DENNIS: I am perfectly comfortable with DAV. In fact, I agree with the result in DAV. The Government won.

(Pause)

THE COURT: Okay, if you think so. We didn't win everything.

MR. DENNIS: No, but I think DAV provides the correct result with respect to that type of item.

THE COURT: What do you mean, are you going to limit DAV to trinkets and disabled veterans and—

MR. DENNIS: Yes. I think the endorsement and administration of a group insurance program is just obviously different from the type of transaction—

THE COURT: What do you mean obviously different? They have different names. It is a more sophisticated service which points out that in understanding its value it may be necessary to take more evidence in deciding what the value of the trinkets is.

Judge Merow may be perfectly able to, as he was, to tell the value of a \$5 trinket, you know, listening to a few witnesses. I may need economists in here to tell me the true value of the kind of administrative and promotional services engaged in by the Plaintiff here.

It is a very sophisticated service. Just to [20] understand what the service is is a burden, much less to try to assign to it a market value on the basis of—now, I am not quite sure I understand: are you agreeing for the purposes of a summary judgement motion that in fact the amount of dividends and experience credits that ABE was getting back were far in excess of the value of the services provided?

Are you conceding that, either for purposes of a summary judgement motion or for purposes of the case?

MR. DENNIS: I concede for purposes of the case entirely that the value of the services, that the amount of money that they receive from the insurance program was vastly in excess of their expenses.

The Government will concede that for purposes of the cases.

THE COURT: But that is not the question I asked. The question was not whether it was vastly in excess of expenses. The question was it vastly in excess of the value of the services which they provided.

MR. DENNIS: It would be vastly in excess of the administrative services, the value of the administrative services also.

THE COURT: Wait a minute, Mr. Dennis. You have defined to me what they do and I have not argued with [21] you on that. You said they provide promotional services. They provide administrative services, and they provide a market. Those are commodities.

People are in the business of providing those things for profits. The question I am asking you: given the commodities that they are selling, that they are providing, as you have defined it, are you willing to concede for purposes of the cases, or purposes of the summary judgement motion, or for any other purpose, that the amount of income they had as a result of the experience credits and dividends is far in excess of the value of the services that they have provided?

(Pause)

Let me just tell you before you concede because if you tell me you are conceding for purposes of the case, I am going to ask Mr. Gregory to move for summary judgement the other way and we will just pack this thing up and send it to the Circuit.

MR. DENNIS: The Government's position is that when you are talking about what is being provided, that you have to look at the value of the insurance, that you don't look at the value of the administrative services.

THE COURT: I realize that, Mr. Dennis, but I disagree with you on that because you yourself have said [22] this is not an insurance company. They don't provide insurance services. They provide administrative and marketing and promotional services.

This is what they provide according to what you yourself has said. You can't look at some other commodity provided by some other company to decide what the value is.

What I am asking is do you concede for purposes of the case or otherwise that—or for purposes of the motion—that the amount of or the value or the service that they provide as a market-maker, as a promoter, or as an administrator of the group insurance fund, however you want to define the commodity, is a small fraction of the amount which they get from the experience credits and the dividends.

Or conversely, that the dividends and experience credits that they get from the companies are vastly in excess of the value of services that the firm provides. Are you willing to concede that?

MR. DENNIS: Could I have a moment, Your Honor?

THE COURT: Of course.

(Pause while Government Counsel confers with his colleague)

MR. DENNIS: Your Honor, in view of your comments, [23] the Government withdraws its motion for summary judgement and will develop the facts along the lines that you deem relevant in the case.

THE COURT: I thought it was you who deemed it relevant. No, I'm kidding. That's fine. Let me ask Mr. Gregory a few questions since we have him here anyway.

You have raised the question of a triable issue of fact, Mr. Gregory, open [*sic*] the question of whether or not these funds were income at all because they were trust funds or they were held in trust.

I have a good bit of trouble with that argument and I think I have been candid with the Defendants and I should be candid with Plaintiffs. Can that argument really apply in the context of 501(C)(3) organization at all?

Wouldn't that defeat unrelated business—I can't remember the name of that—

MR. GREGORY: UBTI.

THE COURT:—UBTI in all cases, since after all charitable organizations are always chartered—well, as a condition for getting exemptions they are required to use their funds in only certain limited ways. So they never have free rein with their money.

* * * * *

In the United States Court of Claims

Docket No. 465-82 T

AMERICAN BAR ENDOWMENT, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

JOINT MEMORANDUM RE STIPULATIONS SUBMITTED PURSUANT TO AOG PBT XVI

(Filed: October 6, 1983)

PART I

The undersigned parties, by their counsel, hereby stipulate and agree that, for purposes of this action only, the following facts shall be taken as true, subject to the right of either party to introduce evidence not inconsistent with any of these stipulated facts.

1. This is an action arising under the Internal Revenue laws of the United States and is brought pursuant to Section 1491 of Title 28 of the United States Code, as amended. This Court has jurisdiction over this action.

2. This action is brought by the American Bar Endowment ("Endowment") for the recovery of the following amounts of unrelated business income tax and assessed interest thereon collected from the Endowment for its fiscal years ended June 30, 1979, 1980 and 1981, together with statutory interest thereon as provided by law.

<u>Year</u>	<u>Tax</u>	<u>Assessed Interest</u>	<u>Total</u>
1979	\$1,587,924.000	\$427,845.18	\$2,015,769.18
1980	2,326,774.00	376,363.66	2,703,137.66
1981	2,105,709.00	87,459.04	2,193,168.04
	\$6,020,407.00	\$891,667.88	\$6,912,074.88

3. The Endowment is a charitable membership corporation organized in 1942 under the laws of the State of Illinois with its principal office in Chicago, Illinois. Prior to 1966, its corporate name was the American Bar Association Endowment. Defendant does not dispute that the Endowment is exempt from Federal income taxation under Section 501(a) and 501(c)(3) of the Internal Revenue Code of 1954, Title 26 of the United States Code, as amended ("the Code").

4. All members of the American Bar Association ("ABA"), a professional association exempt from Federal income taxation under Sections 501(a) and 501(c)(6) of the Code, are, by virtue of their membership in the ABA, members of the Endowment. Members pay no additional dues for membership privileges in the Endowment.

5. The Endowment was organized for one or more exempt purposes within the meaning of Treasury Regulation Section 1.501(c)(3)-1(b).

6. The Endowment has to date made grants of approximately \$63 million for charitable work in the field of law.

7. In its fiscal years 1979, 1980 and 1981, the Endowment awarded grants in the following amounts:

<i>Year</i>	<i>Grants Awarded</i>
1979	\$3,602,462
1980	4,397,619
1981	4,640,000

8. The recipients of the above-referenced grants were the American Bar Foundation, the ABA Fund for Public Education, the Institute of Judicial Administration, the Institute for Court Management, the National College of District Attorneys, The National Council of Juvenile and Family Court Judges, the National College of Criminal Defense Lawyers, the National Institute for Trial Advocacy, and the National Legal Aid and Defender Association.

9. The Endowment has three sources of funds, namely, individual gifts and bequests, investment of cash reserves, and dividends to policyholders and experience credits (also known as retrospective rate refunds or premium refunds). Most of the funds of the Endowment are attributable to the dividends and experience credits.

10. In the early 1950's, leaders of the ABA conceived the idea that providing group life insurance coverage for ABA members could be a means of obtaining funds for the Endowment to further its charitable and educational activities in the field of law.

11. In the early and mid-1950's, William Clarke Mason was the chairman of the Special Committee on Group Life Insurance of the ABA. Mr. Mason spoke with certain insurance companies concerning the idea of a group insurance program as a charitable fund raising tool.

21. At the time that Mr. Mason was speaking with insurance companies in the 1950's, the concept of underwriting a voluntary association for group life insurance was a novel one. At least one of the insurance companies he spoke to, Prudential, was not interested in underwriting an association group.

13. In late 1953, Mr. Mason, representing the American Bar Association, came to New York to meet with several representatives of New York Life Insurance Company, including Joseph W. Moran. The purpose of the meeting was to explore the feasibility of developing a group life insurance plan for members of the American Bar Association to generate funds for charitable and educational purposes in the field of law.

14. After several months of discussion with Mr. Mason, New York Life Insurance Company designed a group insurance program that was offered to the ABA on condition that a minimum number of members enroll. Attached hereto as Exhibit 300 is a true and correct copy of

the Specifications for Group Insurance, dated February 20, 1955 and signed by Mr. Mason. Exhibit 300 may be admitted into evidence.

15. By resolution dated February 19, 1955, the Board of Governors of the American Bar Association requested the Endowment to become the policyholder of the proposed contract with New York Life Insurance Company. This request was presented to the Board of Directors of the Endowment on February 20, 1955. At that meeting, William Clarke Mason presented the proposed contract between the Endowment and New York Life Insurance Company. The Board of Directors of the Endowment authorized the appropriate officer of the Endowment to enter into the contract on behalf of the Endowment. Attached hereto as Exhibit 305 is a true and correct copy of the minutes of the special meeting of the Board of Directors of the Endowment held on February 20, 1955. Exhibit 305 may be admitted into evidence.

16. The contract between the American Bar Endowment and New York Life Insurance Company became effective on June 1, 1955, a sufficient number of Endowment members having enrolled in the program to satisfy New York Life Insurance Company. Attached hereto as Exhibit 306 is a true and correct copy of the minutes of the annual meeting of directors of the Endowment held on August 20, 1955. Exhibit 306 may be admitted into evidence.

17. On June 9, 1955, Mr. Mason wrote the presidents of the American Bar Association and the American Bar Association Endowment summarizing the status of the life insurance program. Attached as Exhibit 268 is a true and correct copy of Mr. Mason's letter. Exhibit 268 may be admitted into evidence.

18. On August 22, 1955, the president of the Endowment reported to the members that the contract had gone into effect between New York Life Insurance Company

and the Endowment and that the Endowment expected that the American Bar Foundation would receive the proceeds of some of the life insurance policies and that the Endowment would receive the dividends from the insurance plan. President Carl B. Rix told the members that the Endowment would reimburse itself for its expenses out of the dividends and expected that funds would be available for the operation and maintenance of the William Nelson Cromwell Library, operated by the American Bar Foundation. Attached hereto as Exhibit 307 is a true and correct copy of the minutes of the annual meeting of members held on August 22, 1955. Exhibit 307 may be admitted into evidence.

19. The original group life insurance contract entered into by the Endowment is known as the "Junior Plan" because the plan was available only to Endowment members through age 55. This plan insured Endowment members through age 55 without evidence of insurability at a premium of \$20 per year per insured member for a schedule of reducing amounts of term insured that graded from \$6,000 at the youngest age to \$1,000 at age 55. For this reason, the plan was also known as the "\$20 a year plan."

20. From the inception of the program, the Junior Plan has provided that dividends are payable to the Endowment under the following clause:

On each policy anniversary to which the policy has been continued by the payment of all premiums due, the divisible surplus, if any, ascertained and apportioned to this policy as a dividend shall be paid in cash to the Association, or upon its written request may be applied towards the payment of any premium hereon.

This clause, or a substantially similar clause, was in effect on the Endowment's policies with New York Life during the years in issue.

21. In 1956, the Endowment received its first dividend check from New York Life Insurance Company, a check in the amount of \$76,997. It has received a dividend from New York Life each year since then.

22. The initial applications for enrollment provided to Endowment members in 1955 contained the following statement: "I agree that any dividends apportioned to the Group Policy shall be payable to the ABA Endowment." All applications for enrollment in the Endowment's group life insurance program since that time have contained the same or a similar statement.

23. The Endowment's second group life insurance plan (known as the "Senior Plan") was instituted January 1, 1957, and insured Endowment members at ages 50 through 69, subject to evidence of insurability, for a level \$5,000 amount of term insurance at premium [sic] rates which increased with the member's advancing age, with decreasing amounts of insurance continuing beyond age 70.

24. The Senior Plan group policy originally provided in part as follows:

On each policy anniversary to which this policy has been continued by payment of all premiums due, the divisible surplus, if any, shall be ascertained and apportioned to this policy as a dividend. Fifty percent of each dividend shall be applied by New York Life toward payment of the next premium due hereon and the remainder shall be paid in cash to the Association.

25. On April 3, 1958, a rider was entered into (with an effective date of January 1, 1958) modifying the above-quoted clause so that it would be identical to the clause contained in the Junior Plan group policy.

26. On August 28, 1960, riders were entered into (with an effective date of June 1, 1960) providing that the Junior and Senior plans would be treated as a single policy for purposes of ascertaining surplus.

27. Liberalizations of the group life Junior Plan in 1957, 1958, 1963, 1967, and 1971 and of the Senior Plan in 1959, 1960, 1962, 1963, and 1967 included extensions of ages at which Endowment members were insured, increases in the amounts of insurance provided without increases in premiums, addition of double benefits for accidental death without an increase in premiums, reductions in premiums, the addition of options to acquire additional amounts of insurance (subject to evidence of insurability), and the addition of options to enroll for insurance on the lives of spouses and children.

28. In 1971, a new series of group life plans was introduced under which Endowment members below age 72 were insured for amounts of term life insurance ranging from \$20,000 to \$100,000 to age 55, and decreasing amounts from age 55 to age 72, with double benefits for accidental death.

29. Changes were made in the group life program, effective June 1, 1981, by amending the Juniors Plan group policy:

Reduced premiums in Life Schedules B through G, as follows:

Benefit Schedule B (\$30,000)	9.0%
Benefit Schedule C (\$40,000)	13.5%
Benefit Schedule D (\$50,000)	16.2%
Benefit Schedule E (\$75,000)	19.8%
Benefit Schedule F (\$100,000)	21.6%
Benefit Schedule G (\$150,000)	23.4%

Introduced a new Schedule H providing a maximum benefit of \$200,000. Offered to members then insured in Schedules B through G, an opportunity to upgrade their coverage by one or two benefit levels without a statement of health.

Extended a similar nonmedical offer to participants in the Junior, Senior, and Maxi I, II, and III plans.

Extended an offer to members age 55 and over to upgrade their coverage with satisfactory evidence of insurability.

The policy continued to provide for the payment by New York Life of all dividends to the Endowment.

30. As a condition of obtaining coverage under any of the group life insurance policies issued by New York Life Insurance Company during the years in issue, the Endowment required that each individual insured sign an application stating that any dividend apportioned to the policy or policies will be paid to the American Bar Endowment.

31. Attached hereto as Exhibits 275 and 276 are true and correct copies of the Endowment's group term life insurance policies with New York Life Insurance Company (including riders) in effect during the period June 30, 1978, through June 30, 1981.

32. For the Endowment's fiscal year 1978-79, the group life insurance program dividend was 47% of gross premiums. For the Endowment's fiscal year 1979-80, the dividend was 55% percent of gross premiums. For the fiscal year 1980-81, the dividend was 65% of gross premiums.

33. Effective November 1, 1961, the Endowment entered into a contract with the Continental Casualty Company to provide disability income coverage for Endowment members (known as the DID program. In-hospital indemnity coverage (known as "ESP"-Essential Supplementary Protection) through Continental Casualty was added in 1965.

34. The DID program consists of two plans—Plan I, which has a 30-day elimination period and Plan II, which has a 365-day elimination period.

35. In 1969, the Endowment transferred both the disability and ESP programs from Continental Casualty Company to Mutual of Omaha Insurance Company which has underwritten them ever since.

36. Effective November 1, 1969, premiums for Plan I of the DID insurance program were reduced by 10 percent or approximately 10 percent at all ages, and premiums for Plan II of the DID insurance program were reduced by 15 percent or approximately 15 percent at all ages.

37. For the Endowment's fiscal year 1978-79, the experience credits on the disability and ESP programs were 38 and 48 percent of gross premiums respectively. For the Endowment's fiscal year 1979-80, the experience credits on the disability and ESP programs were 54 and 39 percent of gross premiums respectively. For the Endowment's fiscal year 1980-81, the experience credits were 34 and 45 percent of gross premiums respectively.

38. The Endowment and Mutual of Omaha entered into a Contingency Fund Escrow Account Agreement effective December 3, 1970. True and correct copies of this agreement, an addendum listing the securities held in escrow account, and the acknowledgement and receipt by the administrator of the escrow account are attached as Exhibit 3400.

39. Effective May 1, 1971, premiums for Plan I of the DID insurance program were reduced by 10 percent or approximately 10 percent at all ages.

40. Effective May 1, 1974, benefits were increased for the DID insurance program.

41. Effective May 1, 1980, the maximum benefit levels offered under the DID insurance program were changed by adding a \$2,000 monthly benefit and a \$2,500 monthly benefit available to eligible members at certain ages.

42. Attached hereto as Exhibit 277 is a true and correct copy of the Endowment's group insurance disability policy with Mutual of Omaha (including riders) in effect during the period June 30, 1978, through June 30, 1981.

43. In 1970, the following changes were made to the ESP program (effective May 1, 1970):

A new schedule of daily in-hospital benefit of \$40 per day for ages 65 and under and \$25 a day for ages over 65 was offered to both new and existing insureds.

The \$20 a day benefit (Schedules A & B) was no longer offered to new members.

A Schedule C offering a \$80 a day benefit was added.

44. Attached hereto as Exhibit 278 is a true and correct copy of the Endowment's group insurance in-hospital policy with Mutual of Omaha (including riders) in effect during the period June 30, 1978, through June 30, 1981.

45. In 1973, the Endowment and Mutual of Omaha Insurance Company entered into a contract whereby catastrophic major medical insurance, with a \$10,000 deductible, was provided to Endowment members and their dependents. When the program was first underwritten, the experience on it was good and experience credits were 44%, 65%, 69%, 40% and 37% of the respective gross premiums for the Endowment's fiscal years 1974, 1975, 1976, 1977 and 1978. In the last four years, however, inflation in health care costs, including increased availability and use of expensive new technology, has adversely affected the program. Rates have been raised four times in the past four years. For the Endowment's fiscal years 1979, 1980 and 1981, the experience credits on this program were 2.2%, 10.2% and 20.3% of gross premiums respectively.

46. The Endowment and Mutual of Omaha entered into a Contingency Fund Escrow Account Agreement, effective June 8, 1974, whereby the Endowment agreed to create a Contingency Fund Escrow Account on the major medical policy to meet Mutual of Omaha's requirements. True and correct copies of this agreement, an addendum listing securities held in escrow account, and the acknowledgement and receipt by the escrow account administrator are attached as Exhibit 3401.

47. Effective September 1, 1979, rates were increased in the major medical program by 40 percent for members and spouses and by 100 percent for children.

48. Effective September 1, 1980, the following changes were made to the major medical program:

A new \$15,000 deductible plan was offered at the same rate as the \$10,000 deductible plan.

At the same time, rates for the \$10,000 deductible plan were increased by 25 percent for new enrollees.

Rates for the \$10,000 deductible plan for existing enrollees were increased by 25 percent effective March 1, 1981.

49. Effective September 1, 1982, rates were increased by 30 percent in the major medical program, except for members aged 65 and over.

50. Attached hereto as Exhibit 280 is a true and correct copy of the Endowment's group major medical insurance policy with Mutual of Omaha (including riders) in effect during the period June 30, 1978, through June 30, 1981.

51. Effective November, 1971, Mutual of Omaha and the Endowment entered into a contract whereby accidental death and dismemberment (ADD 250) coverage up to \$250,000 was provided to Endowment members. ADD 250 provides both an individual and a family plan. Enrollment was not as great as expected and claims experience was unexpectedly adverse for the first few years of the program resulting in no experience credits for the Endowment's fiscal years 1977 and 1978. For the Endowment's fiscal years 1979, 1980 and 1981, the experience credits were 0%, 52%, and 0% of gross premiums respectively.

52. The Endowment and Mutual of Omaha entered into a Contingency Deposit Escrow Account Agreement, effective November 1, 1976, for the ADD 250 program. True and correct copies of this agreement, the addendum

listing securities to be held (labeled American Bar Endowment), and the acknowledgement and receipt of securities by the administrator of the escrow account are attached as Exhibit 3402.

53. Attached hereto as Exhibit 279 is a true and correct copy of the Endowment's group ADD/250 program with Mutual of Omaha (including riders) in effect during the period June 30, 1978, through June 30, 1981.

54. Under the terms of the group insurance contracts between the Endowment and Mutual of Omaha, retrospective rate credits are payable to the Endowment.

55. The applications for enrollment for all the group insurance policies issued by Mutual of Omaha during the years in issue contained the following statement: "I understand and agree . . . that any experience credits apportioned to the Group Policy shall be payable to the American Bar Endowment and are contributions from the participants."

56. The Endowment is the group policyholder for each of its insurance programs.

57. Each Endowment member who enrolls in an insurance program makes a payment of his or her portion of the premium to the Endowment which in turn pays the total gross premium for the insurance program to the appropriate insurance company.

58. In its fiscal years 1979, 1980 and 1981, the Endowment paid the following aggregate amounts of gross premiums and received the following aggregate amounts of dividends and experience credits from New York Life and Mutual of Omaha:

Year	Gross Premiums	Dividends/Experience Credits
1979	\$12,786,240	\$5,132,662
1980	13,689,726	6,758,341
1981	14,107,634	6,860,190

59. In the years in issue in this litigation as well as in preceding years back to 1964, after receipt of dividends and experience credits from New York Life and Mutual of

Omaha (or Continental Casualty) the Endowment mailed a notice informing each insured member of the percentage of his or her payment toward gross premium for the prior year that the Endowment contended constituted the member's charitable contribution to the Endowment. True and correct copies of such notices are attached hereto as Exhibits 189 through 224. Exhibits 189 through 224 may be admitted into evidence.

60. In determining the percentages for each year that the Endowment contends constituted charitable contributions, the Endowment deducted its expenses of operation allocable to the administration of its insurance programs from the dividends and experience credits received from New York Life and Mutual of Omaha. The Endowment does not contend that it deducted from dividends and experience credits during its fiscal years 1979, 1980 and 1981 expenses not allocable to its group insurance programs.

61. During its fiscal years 1979, 1980 and 1981, the Endowment had insurance contracts only with New York Life and Mutual of Omaha, both of which are insurance companies licensed to do business in the State of Illinois.

62. During its fiscal years 1979, 1980 and 1981, there was a licensed insurance broker for the Endowment insurance program whose compensation was paid on a commission basis by New York Life and Mutual of Omaha.

63. The Commissioner of Internal Revenue caused the Endowment's returns for its fiscal years 1979, 1980 and 1981 to be audited and, as a result of such audits, determined against the Endowment unrelated business income tax deficiencies for such years which were paid to the Internal Revenue Service by the Endowment as follows:

Year	Principal Payment	Date Paid	Interest Payment	Date Paid
1979	\$1,587,000	3/2/82	\$427,845.15	11/2/82
	924	7/8/82		
1980	2,326,774	3/2/82	376,363.66	7/8/82
1981	2,105,709	3/2/82	—	—

64. On December 30, 1982, the Endowment, which previously had paid \$2,105,709.00 in unrelated business income tax for its 1981 fiscal year to the Internal Revenue Service, paid \$87,459.04 in interest on that payment. Such amount of interest was computed based on the \$2,105,709 in unrelated business income tax for the Endowment's 1981 fiscal year paid to, and subsequently assessed by, the Internal Revenue Service.

65. Attached hereto as Exhibit 367, Exhibit 311 and Exhibit 368 are true and correct copies of the revenue agent's reports for the Endowment's fiscal years 1979, 1980 and 1981.

66. On July 15, 1982, the Endowment filed with the Director of the Regional Service Center in Kansas City, Missouri, Claims for Refund, consisting of Forms 990-T accompanied by a statement of facts and grounds upon which the refund of tax paid for each of its fiscal years 1979, 1980, and 1981, and the refund of interest paid for its fiscal year 1980, was sought. On December 30, 1982, the Endowment filed with the Director of the Regional Service Center in Kansas City, Missouri, Claims for Refund of interest, consisting of amended Forms 990-T accompanied by a statement of facts and grounds upon which the refund of interest paid for its fiscal years 1979 and 1981 was sought. All such claims were filed within the time prescribed by law and set forth the grounds upon which this suit is brought.

67. On August 6, 1982, the Commissioner mailed by certified mail a notice of disallowance in full of the Claims for Refund filed on July 15, 1982. Six months have passed without final action by the Internal Revenue Service on the Claims for Refund filed on December 30, 1982. This suit is brought within the time prescribed by law.

68. Although repayment thereof has been demanded, no part of the sum of \$6,912,074.88 has been credited, remitted, refunded, or repaid to the Endowment or to anyone on its account.

69. Attached hereto as Exhibits 281, 282, 1109, and 283 are copies of Financial Reports forwarded by New York Life Insurance Company to the Endowment for life insurance policy years ending May 31, 1978, May 31, 1979, May 31, 1980 and May 31, 1981 respectively. Exhibits 281, 282, 1109 and 283 may be admitted into evidence.

70. Attached hereto as Exhibits 284, 285, 286 and 287 are copies of Disability and E.S.P. Experience and Claim study reports forwarded by Mutual of Omaha Insurance Company to the Endowment for policy years ending October 31, 1972, October 31, 1973, October 31, 1974, October 31, 1975, October 31, 1976, October 31, 1977, October 31, 1978, October 31, 1979, October 31, 1980 and October 31, 1981 inclusive. Exhibits 284, 285, 286, and 287 may be admitted into evidence.

71. Attached hereto as Exhibits 289, 290, 291, and 292 are copies of Major Medical Experience and Claim Study reports forwarded by Mutual of Omaha to the Endowment for policy years ending February 28, 1978, February 28, 1979, February 29, 1980 and February 28, 1981 inclusive. Exhibits 289, 290, 291, and 292 may be admitted into evidence.

72. Attached hereto as Exhibits 293, 294, 295, and 296 are copies of ADD/250 Program Experience and Claim Reports forwarded by Mutual of Omaha to the Endowment for policy years ending July 31, 1978, July 31, 1979, July 31, 1980 and July 31, 1981 respectively. Exhibits 293, 294, 295 and 296 may be admitted into evidence.

73. This Court has jurisdiction over the cases of *Turner v. United States*, No. 163-83T, *Sherwood v. United States*, No. 190-83T, *Boynton v. United States*, No. 320-83T and *Broadfoot v. United States*, No. 351-83T.

74. Most lawyers have life insurance.

75. Most lawyers have accident and/or health insurance.

76. The dividends and experience credits received by the Endowment would not exist but for the payments toward premium by insured members in the year before the receipt by the Endowment of dividends or experience credits being greater than the losses incurred and retention due to the insurance carriers in the year to which the dividends or experience credits relate.

77. Attached hereto as Exhibits 178 and 179 are true and correct copies of the Endowment's exempt organization business income tax returns for the fiscal year beginning July 1, 1978 and ending June 30, 1979, as originally filed and as amended, with attached "Explanation of Claim for Refund." Exhibits 179 and 178 may be admitted into evidence.

78. Attached hereto as Exhibit 180 is a true and correct copy of the Endowment's exempt organization business income tax return for the fiscal year beginning July 1, 1979 and ending June 30, 1980, with attached "Explanation of Claim for Refund." Exhibit 180 may be admitted into evidence.

79. Attached hereto as Exhibits 177 and 181 are true and correct copies of the Endowment's exempt organization business income tax returns for the year beginning July 1, 1980 and ending June 30, 1981, as originally filed and as amended, with attached "Explanation of Claim for Refund." Exhibits 177 and 181 may be admitted into evidence.

80. Attached hereto as Exhibit 267 is a true and correct copy of the American Bar Endowment's Articles of Incorporation and By-laws in effect during the years in issue in this litigation. Exhibit 267 may be admitted into evidence. Attached hereto as Exhibit 3403 is a true and correct copy of the American Bar Endowment's original Articles of Incorporation and By-Laws. Exhibit 3403 may be admitted into evidence.

81. Attached hereto as Exhibits 784, 312, 785 through 787, and 313 through 316 are true and correct copies of the annual reports of the Endowment distributed to all Endowment members for its years ended 1973 to 1981, respectively. Exhibits 784, 312, 785 through 787 and 313 through 316 may be admitted into evidence.

82. During the years in issue in this litigation, each of the Endowment's directors was a volunteer member of the Endowment who was reimbursed only for out of pocket expenses. No director received monetary or other compensation for the substantial expenditure of time attributable to carrying out the duties of a director. -

83. Participation in the Endowment's group insurance programs has always been voluntary.

84. During the years in issue in this litigation, less than 25% of the members of the ABA participated in one or more of the Endowment's insurance programs.

85. Prior to and during the Endowment's fiscal years 1979, 1980 and 1981, the American Bar Association did not establish group insurance programs for its members.

86. The Endowment received a proposal from James Group Service, Inc., in 1981 to administer the Endowment's group insurance programs for a fee of about \$1,000,000 per year. Attached hereto as Exhibits 737 and 329 are true and accurate copies of James Group Service, Inc.'s proposal and the specifications for that proposal prepared by James Group Service, Inc. Exhibits 737 and 329 may be admitted into evidence.

87. New York, Nebraska, and Illinois law prohibit anyone other than a licensed agent or broker from being the agent or broker of record and anyone but the agent or broker of record from receiving a broker's or agent's commission. The Endowment is not and never has been the agent or broker of record with respect to its group insurance programs.

88. The American Bar Association maintains a list of the names and addresses of its entire membership.

89. The American Bar Association rents its membership list to commercial organizations for a commercially competitive fee. During the years in issue, the American Bar Association charged commercial organizations a basic fee of \$35.00 or \$40.00 per thousand names. Attached hereto as Exhibits 1209 and 1210 are the price lists of the American Bar Association dated May, 1978 and July, 1980. Exhibits 1209 and 1210 may be admitted in evidence.

90. The American Bar Association does not require the Endowment to rent its membership list. Rather, the Endowment pays only for the cost of the ABA's data processing service and the production of labels. The Endowment does not pay the ABA a commercially competitive fee for use of the membership list.

91. The charge by the ABA for data processing service and mailing labels to the Endowment varied from \$8.00 per thousand names to \$8.75 per thousand names during the years in issue in this litigation.

92. The Endowment operates on a July 1-June 30 fiscal year and uses the accrual basis of accounting.

93. Attached hereto as Exhibits 3408, 3409, 3410, 3411, 3412, 3413, 3414, 1864, 1863, 1861, and 3415 are true and correct copies of the Audited Financial Statements and Other Financial Information for the Endowment's fiscal years ended June 30, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979 and 1980 and the Audited Financial Statements and Supplementary Information for the Endowment's fiscal year ended June 30, 1981 and 1982. Exhibits 3408, 3409, 3410, 3411, 3412, 3413, 3414, 1864, 1863, 1861, and 3415 may be admitted into evidence.

94. During its fiscal years ended June 30, 1979, 1980, and 1981, the Endowment accrued the following amounts as dividends and experience credits from the respective insurance carriers (New York Life and Mutual of Omaha):

	<u>1979</u>	<u>1980</u>	<u>1981</u>
Dividend on life insurance program for policy years ended May 31, 1979, 1980, and 1981	\$3,466,830	\$4,266,309	\$4,981,412
Experience credit on disability insurance program for policy years ended October 31, 1978, 1979, and 1980	1,092,975	1,563,802	1,101,491
Experience credit on in-hospital indemnity program for policy years ended October 31, 1978, 1979, and 1980	555,463	462,481	527,718
Experience credit on major medical program for policy years ended February 28, 1979, 1980, and 1981	17,394	117,658	249,569
Experience credit on accidental death and dismemberment program for policy years ended July 31, 1978, 1979, and 1980	-0-	348,091	-0-

95. During the years in issue in this litigation, the Endowment allocated its operating expenses (costs) among its eight activities—the life insurance program, the disability income insurance program, the in-hospital indemnity insurance program, the major medical insurance program, the accidental death and dismemberment insurance program, grants, investments, and the Memorial Fund. Taking all five insurance programs into account, the expenses were so allocated by use of a [sic] allocation system which, based on regularly maintained activity records of the Endowment, reasonably matched the Endowment's expenses to the activities and Endowment department that generated them. Attached hereto as Exhibit 229 is a true and correct copy of a report by Peter P. Kezon, Jr., dated January 11, 1980, which summarizes the Endowment's cost allocation system. Exhibit 229 may be admitted into evidence.

96. The cost allocation system used by the Endowment to allocate its operating expenses among its eight activities during the years in issue in this litigation has been used consistently by the Endowment since and during its fiscal year ended June 30, 1977.

97. By application of the cost allocation system, the Endowment allocated its operating expenses for its fiscal years ended June 30, 1979, 1980, and 1981 among its eight activities as follows:

	<u>1979</u>	<u>1980</u>	<u>1981</u>
Life insurance program	\$483,410	\$431,189	\$744,473
Disability income insurance program	265,876	280,275	277,259
In-hospital indemnity insurance program	198,671	254,441	210,149
Major medical insurance program	303,016	137,364	467,587
Accidental death and dismemberment insurance program	228,316	222,926	212,534
Grants	1,091	834	1,365
Investments	84,949	101,541	110,068
Memorial Fund	2,058	1,059	-0-

Taking all five insurance programs into account, such allocations appropriately reflected Endowment's costs in such fiscal years. If the Court's judgment is for less than the amount prayed for by plaintiff but more than zero, defendant contends that the proper allocation of income and expenses will require a recomputation in accordance with the Court's opinion.

98. Attached hereto as Exhibit 225 is a true and correct copy of a letter dated December 12, 1979 to Richard S. Breiner, Administrator of the Endowment, from Ernst & Whinney which sets forth Ernst & Whinney's computations of the percentage of insurance premium collections from insured members for the Endowment's fiscal year ended June 30, 1979 and policy years ended within that fiscal year which the Endowment treated as charitable contributions from its insured members. Exhibit 225 may be admitted into evidence.

99. Attached hereto as Exhibit 226 is a true and correct copy of a letter dated December 2, 1980 to Richard S. Breiner, Administrator of the Endowment, from Ernst & Whinney which sets forth Ernst & Whinney's computation of the percentage of insurance premium collections from insured members for the Endowment's fiscal year ended June 30, 1980 and policy years ended within that fiscal

year which the Endowment treated as charitable contributions from its insured members. Exhibit 226 may be admitted into evidence.

100. Attached hereto as Exhibit 227 is a true and correct copy of a letter dated November 9, 1981 to Richard S. Breiner, Administrator of the Endowment, from Arthur Young & Company which sets forth Arthur Young & Company's review of the Endowment's computation of the percentage of insurance premium collections from insured members for the Endowment's fiscal year ended June 30, 1981 and policy years ended within that fiscal year which the Endowment treated as charitable contributions from its insured members. Exhibit 227 may be admitted into evidence.

101. The Endowment vigorously pursues enrollment of new members and members who have not enrolled in the insurance program and it seeks to induce those members already enrolled to increase their coverage.

102. The Endowment's solicitation efforts were made primarily through the mail and through answering telephone inquiries concerning the program.

103. The Endowment distributes to its members brochures, rate schedules, and applications, all bearing its name. Its correspondence endorses the group insurance.

104. The tasks undertaken by plaintiff in administering the group insurance programs during the years in issue in this litigation included processing of enrollment applications to some extent; disbursing certificates of coverage to members; billing, collecting, and accounting for premiums due from individuals insured; forwarding premiums to the applicable insurance company; disbursing premium refunds to individuals [sic] insured members who cancel coverage or pay an incorrect premium; and checking claims for completeness prior to processing by the insurance company which consists of verifying the status of members and checking to see if the proper premium has been paid and that the insurance benefits are in effect.

105. Approximately 75 percent of the applicants for insurance through the Endowment's group insurance program are approved by the Endowment by means of "screen rules" set up the the [sic] insurance companies.

106. Exhibit 8 of Appendix B to the brief for the United States in support of its motion for summary judgment, filed February 23, 1983 is a true and correct copy of New York Life Insurance Company procedures and underwriting rules for American Bar Endowment dated March 3, 1975.

107. The insurance programs are administered by the Endowment staff (which fluctuated from approximately 34 to 44 people during the years in issue in this litigation) under the direction of an administrator.

108. Attached hereto as Exhibit 3404 is a true and correct copy of the *1966 Report of the American Bar Endowment* which appeared in Volume 52 of the American Bar Association Journal (1966). Exhibit 3404 may be admitted into evidence.

109. Exhibit 18 of Appendix B to the brief for the United States in support of its motion for summary judgment, dated February 23, 1983, accurately sets forth the names and departments of employees who accrued vacation during the fourth quarter of fiscal year 1981.

110. Exhibit 19 of Appendix B to the brief for the United States in support of its motion for summary judgment, filed February 23, 1983, contains accounting procedures for the Endowment for fiscal year 1981.

111. Attached hereto as Exhibit 3405 is a true and correct copy of an article by Harold J. Gallagher, then a director of the Endowment, entitled *Group Life Insurance Plan for Members of the American Bar Association*. That article appeared in Volume 41 of the American Bar Association Journal (1955). Exhibit 3405 may be admitted into evidence.

112. Attached hereto as Exhibit 3406 is a true and correct copy of an article entitled *Endowment Insurance Offers Expanded Benefits* which appeared in Volume 44 of the American Bar Association Journal (1958). Exhibit 3406 may be admitted into evidence.

113. Attached hereto as Exhibit 3407 is a true and correct copy of the *1962 Annual Report to Members of American Bar Association Endowment*, which appeared in Volume 48 of the American Bar Association Journal (1962). Exhibit 3407 may be admitted into evidence.

114. During its fiscal year 1980, more than 57,000 of the Endowment's total membership participated in its group insurance program (either by renewal or first-time participants). The number of insurance certificates outstanding in all of the programs by the Endowment was 111,260. The Life Insurance Plan, underwritten by New York Life Insurance Company, had \$2.75 billion of insurance in force, representing almost a three-fold increase over the amount of insurance in force in 1974.

115. Attached hereto as Exhibits 842, 847, 858, 859, 862, 863, 971, 882, 883 and 888 are true and accurate copies, respectively, of "Nineteen Seventy-seven, Seventy-eight Add/250 Promotion Summary"; "Nineteen Seventy-seven, Seventy-eight Major Medical Promotion Summary"; "Life Promotion Summary 1979"; "Add/250 Promotion Summary 1978-79"; "Summary of Promotions 1978-79"; "Add/250 Promotion Summary 1979-80"; "DID Promotion Summary 1979-80"; "ESP Promotion 1979-80"; "Summary of Promotions 1979-80, etc."; and "The Life Promotion." Exhibits 842, 847, 858, 859, 862, 863, 871, 882, 883, and 888 are copies of documents found in the files of the Endowment and may be admitted into evidence.

116. Attached hereto as Exhibit 582 is a true and correct copy of a letter dated June 2, 1978, from Richard S. Breiner to Kenneth Liles. Exhibit 582 may be admitted into evidence.

117. The Endowment will not contend at trial that it did not regularly carry on the activities associated with its role as group policyholder.

118. The Endowment will not contend at trial that the activities associated with its role as group policyholder are substantially related to its tax-exempt purpose within the meaning of IRC § 513(a).

119. Attached hereto as Exhibit 627 is a true and accurate copy of a report dated 10/10/80, with exhibits, prepared by Joseph W. Moran, New York Life. Exhibit 627 may be admitted into evidence.

120. Attached hereto as Exhibits 2044-2053 and 2070-2091 are true and correct copies of documents contained in the Endowment's files concerning State Bar of California, New Jersey St. Bar Assn., St. Bar of Georgia, Conn. Bar Assn., Colo. Bar Assn., Arkansas Bar Assn., Alaska Bar Assn., Alabama Bar Assn., State Bar of Texas, Kentucky Bar Assn., Iowa St. Bar Assn., Indiana State Bar, Miss. State Bar, Minn. State Bar, State Bar of Michigan, Mass Bar Assn., Maryland St. Bar Assn., Maine St. Bar Assn., Louisiana St. Bar Assn., Ohio St. Bar Assn., NY State Bar Assn., N Carolina Bar Assn., Nebraska St. Bar Assn., Detroit Bar Assn., Virginia State Bar, St. Louis Bar Assn., St. Bar of S. Dak., S. Carolina Bar, Oklahoma Bar Assn., Essex Co. Bar Assn. LA County Bar Assn. and Phil. Bar Assn.

In the United States Court of Claims

Docket No. 163-83 T

FREDERICK D. TURNER AND MARGARET S. TURNER,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT

**JOINT MEMORANDUM RE STIPULATIONS
SUBMITTED PURSUANT TO AOGPBT ¶VI**

(Filed: October 6, 1983)

PART I

The undersigned parties, by their counsel, hereby stipulate and agree that, for purposes of this action only, the following facts shall be taken as true, subject to the right of either party to introduce evidence not inconsistent with any of these stipulated facts.

1. This is a suit for refund of \$25 in tax, plus statutory interest, for the tax year ended December 31, 1980.

2. Plaintiff* is a member of the American Bar Association, a professional membership association for lawyers. The Association has been found by the Internal Revenue Service to be exempt from federal income taxation under Sections 501(a) and 501(c)(6) of the Internal Revenue Code. Plaintiff is also a member of the American

* For clarity in this stipulation, "plaintiff" will refer to Frederick D. Turner and "plaintiffs" will refer to Frederick D. Turner and Margaret S. Turner.

Bar Endowment, by reason of his membership in the American Bar Association. The Endowment is an educational and charitable membership association which also has been found by the Internal Revenue Service to be exempt from federal income taxation under Sections 501(a) and 501(c)(3) of the Internal Revenue Code. The Endowment's by-laws provide that all members in good standing in the American Bar Association are members of the Endowment.

3. Since the mid-1950's, the Endowment has sponsored a group insurance program for its members as a means of obtaining additional funds for its charitable purposes in the field of law.

4. During the taxable year involved, and since the insurance program was first initiated, the Endowment was the group policyholder of group life insurance policies underwritten by New York Life Insurance Company. This group insurance was available to all Endowment members who were eligible to enroll in the life insurance program.

5. Pursuant to the terms of these policies, dividends were paid to the policyholder (*i.e.*, the Endowment) by the New York Life Insurance Company. The group policies with New York Life Insurance company expressly provided as follows until June 1, 1981:

On each policy anniversary to which this policy has been continued by payment of all premiums due, the divisible surplus, if any, ascertained and apportioned to this policy as a dividend shall be paid in cash to the Association, or upon its written request may be applied towards the payment of any premiums hereon.

6. As a condition to enrolling in the group life insurance program, the Endowment has required that each individual insured sign an application stating that any dividends apportioned to the policy or policies will be paid to the American Bar Endowment.

7. The Endowment contends that the dividends, after deduction of allocable expenses, are received from the members as charitable contributions. In this regard, the Endowment mails a notice to each individual insured every year, informing the member of the percentage of his or her gross premium payment for the prior year that the Endowment alleges constitutes a charitable contribution. In determining the percentage that constituted the alleged charitable contribution, the Endowment deducts its expenses allocable to the administration of its life insurance program.

8. Effective December 1, 1972, plaintiff enrolled for \$20,000 of life insurance coverage under the Endowment's group life insurance program underwritten by New York Life Insurance Company. When plaintiff enrolled for coverage under the group life insurance program, he reviewed Endowment literature and signed a statement on the application form agreeing and acknowledging that any dividends apportioned to the life insurance program by New York Life would be paid to the Endowment.

9. Since enrolling in the group insurance program, plaintiff has paid the applicable gross premium each year. During the period in dispute, plaintiff paid semiannual premiums of \$50 on November 15, 1978, May 27, 1979, December 1, 1979, May 5, 1980, November 4, 1980, and May 20, 1981.

10. A booklet entitled *Group Insurance Program, Time to Get Aboard*, summarizing the principal provisions of the group insurance benefits, which was received by plaintiff and reviewed by him before he entered into the group insurance program in 1972, stated, *inter alia*, that —

The Program offers eligible Endowment members attractive insurance benefits for a reasonable annual cost.

A true and correct copy of this booklet is attached hereto as Exhibit 376. In 1979, dependent spouse and child coverage offered through the Endowment was increased. The Endowment also advertised a special 45-day period wherein uninsured members under age 50 could obtain \$20,000 of coverage without medical evidence of insurability. In 1981, New York Life reduced premium rates on certain parts of the Endowment plan and increased maximum life insurance benefits.

11. In 1980, plaintiff received a written notice from the Endowment, which had received a dividend from New York Life, advising that, in the opinion of the Endowment's auditors and counsel, each insured member had in 1980 made a contribution of 49.3 percent of any life insurance premiums paid in the period from December 1, 1978, through November 30, 1979. The Endowment further advised in the notice that the Internal Revenue Service had ruled that members were not entitled to charitable contribution deductions for any portion of their premium payments.

12. Plaintiffs, in filing their joint federal income tax return for 1980, did not claim a deduction for any portion of the gross insurance premium paid to American Bar Endowment. Plaintiffs subsequently filed a claim for refund, contending that they were entitled to an additional charitable contribution of \$49 relating to the gross premium payment made to the American Bar Endowment. The instant suit followed.

13. Attached as Exhibit No. 8005 are the answers of plaintiff Frederick D. Turner to defendant's first set of interrogatories.

14. Attached as Exhibit No. 8006 are the answers of plaintiff to defendant's second set of interrogatories.

15. Attached as Exhibit No. 8007 is the response of plaintiff to defendant's first request for production of documents.

PART II

Neither party proposed any stipulations in *Turner v. United States* which they wish to address in this part of the Memorandum Re Stipulations.

Dated: October 5, 1983

Respectfully submitted,

The United States

Frederick D. Turner and
Margaret S. Turner

By /s/ B. JOHN WILLIAMS, JR. By /s/ FRANCIS M. GREGORY, JR.

B. John Williams, Jr.
Acting Assistant
Attorney General

Francis M. Gregory, Jr.

In the United States Court of Claims

Docket No. 190-83 T

ARTHUR M. SHERWOOD AND KAREN H. SHERWOOD,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT

JOINT MEMORANDUM RE STIPULATIONS
SUBMITTED PURSUANT TO AOGPBT XVI

(Filed: October 6, 1983)

PART I

The undersigned parties, by their counsel, hereby stipulate and agree that, for the purposes of this action only, the following facts shall be taken as true, subject to the right of either party to introduce evidence not inconsistent with any of these stipulated facts.

1. This is a suit for refund of \$35.09 in tax, plus statutory interest, for the tax year ended December 31, 1981.

2. Plaintiff* is a member of the American Bar Association, a professional membership association for lawyers. The Association has been found by the Internal Revenue Service to be exempt from federal income taxation under Section 501(a) and 501(c)(6) of the Internal Revenue Code. Plaintiff is also a member of the American

* For clarity in this stipulation, "plaintiff" will refer to Arthur M. Sherwood and "plaintiffs" will refer to Arthur M. Sherwood and Karen H. Sherwood.

Bar Endowment, by reason of his membership in the American Bar Association. The Endowment is an educational and charitable membership association which also has been found by the Internal Revenue Service to be exempt from federal income taxation under Sections 501(a) and 501(c)(3) of the Internal Revenue Code. The Endowment's by-laws provide that all members in good standing in the American Bar Association are members of the Endowment.

3. Since the mid-1950's, the Endowment has sponsored a group insurance program for its members as a means of obtaining additional funds for its charitable purposes in the field of law.

4. During the taxable year involved, and since the insurance program was first initiated, the Endowment was the group policyholder of group life insurance policies underwritten by New York Life Insurance Company. This group insurance was available to all Endowment members who were eligible to enroll in the life insurance program.

5. Pursuant to the terms of these policies, dividends were paid to the policyholder (*i.e.*, the Endowment) by the New York Life Insurance Company. The group policies with New York Life Insurance company expressly provided as follows until June 1, 1981:

On each policy anniversary to which this policy has been continued by payment of all premiums due, the divisible surplus, if any, ascertained and apportioned to this policy as a dividend shall be paid in cash to the Association, or upon its written request may be applied towards the payment of any premiums hereon.

6. As a condition to enrolling in the group life insurance program, the Endowment has required that each individual insured sign an application stating that any dividends apportioned to the policy shall be payable to the American Bar Endowment.

7. The Endowment contends that the dividends, after deductions of allocable expenses, are received from the members as charitable contributions. In this regard, the Endowment mails a notice to each individual insured every year, informing the member of the percentage of his or her gross premium payment for the prior year that the Endowment alleges constitutes a charitable contribution. In determining the percentage that constituted the alleged charitable contribution, the Endowment deducts its expenses allocable to the administration of its life insurance program.

8. Effective June 1, 1972, plaintiff enrolled for the Junior Plan under the Endowment's group life insurance program underwritten by New York Life Insurance Company. When plaintiff enrolled for coverage under the group life insurance program, he reviewed Endowment literature and signed a statement on the application form agreeing and acknowledging that any dividends apportioned to the life insurance program by New York Life would be paid to the Endowment. Plaintiff increased his coverage to \$20,000 effective June 1, 1978.

9. Since enrolling in the group insurance program, plaintiff has paid the applicable gross premium each year. During the period in dispute, plaintiff paid semiannual premiums of \$62 on November 27, 1979, May 5, 1980; November 5, 1980; May 7, 1981; and December 21, 1981. In 1979, dependent spouse and child coverage offered through the Endowment was increased. The Endowment also advertised a special 45-day period wherein uninsured members under age 50 could obtain \$20,000 of coverage without medical evidence of insurability. In 1981, New York Life reduced premium rates on certain parts of the Endowment and increased maximum life insurance benefits.

10. In 1981, plaintiff received a written notice from the Endowment, which had received a dividend from New York Life, advising him that, in the opinion of the Endow-

ment's auditors and counsel, each insured member had in 1981 made a contribution to the Endowment of 55.4 percent of any life insurance premiums paid in the period from December 1, 1979, through November 30, 1980. The Endowment further advised in the notice that the Internal Revenue Service had ruled that insured members were not entitled to charitable contribution deductions for any portion of their premium payments.

11. Plaintiffs, in filing their joint federal income tax return for 1981, did not claim a deduction for any portion of the gross insurance premium paid to American Bar Endowment. Plaintiffs subsequently filed a claim for refund, contending that they were entitled to an additional charitable contribution of \$68.70 with respect to dividends to the policyholder paid to the American Bar Endowment. The instant suit followed.

12. Attached as Exhibit No. 8003 are the answers of plaintiff to defendant's first set of interrogatories.

13. Attached as Exhibit No. 8004 are the answers of plaintiff to defendant's second set of interrogatories.

PART II

Neither party proposed any stipulations in *Sherwood v. United States* which they wish to address in this part of the Memorandum Re Stipulations.

Dated: October 5, 1983

Respectfully submitted,

The United States

Arthur M. Sherwood and
Karen M. Sherwood

By /s/ B. JOHN WILLIAMS, JR. By /s/ FRANCIS M. GREGORY, JR.

B. John Williams, Jr.

Francis M. Gregory, Jr.

Acting Assistant

Attorney General

In the United States Court of Claims

Docket No. 320-83 T

FREDERICK G. BOYNTON, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

JOINT MEMORANDUM RE STIPULATIONS
SUBMITTED PURSUANT TO AOGPBT ¶VI

(Filed: October 6, 1983)

PART I

The undersigned parties, by their counsel, hereby stipulate and agree that, for the purposes of this action only, the following facts shall be taken as true, subject to the right of either party to introduce evidence not inconsistent with any of these stipulated facts.

1. This is a suit for refund of \$38 in tax, plus statutory interest, for the tax year ended December 31, 1981.

2. Plaintiff is a member of the American Bar Association, a professional membership association for lawyers. The Association has been found by the Internal Revenue Service to be exempt from federal income taxation under Sections 501(a) and 501(c)(6) of the Internal Revenue Code. Plaintiff is also a member of the American Bar Endowment, by reason of his membership in the American Bar Association. The Endowment is an educational and charitable membership association which also has been found by the Internal Revenue Service to be exempt from federal income taxation under Sections 501(a) and 501(c)(3) of the Internal Revenue Code. The Endowment's by-laws provide that all members in good standing in the American Bar Association are members of the Endowment.

3. Since the mid-1950's, the Endowment has provided a group insurance program to its members as a means of obtaining additional funds.

4. During the taxable year involved, and since 1969, the Endowment has been the group policyholder of a group disability insurance policy underwritten by Mutual of Omaha Insurance Company. This group insurance was available to all Endowment members who were eligible to enroll in the disability insurance program.

5. Pursuant to the terms of this policy, the retrospective rate credits were paid to the policyholder (*i.e.*, the Endowment) by the Mutual of Omaha.

6. As a condition of enrolling in the group disability insurance program, the Endowment has required that each individual insured sign an application stating that any experience credits apportioned to the group policy shall be payable to the Endowment.

7. The Endowment contends that the retrospective rate credits, after deduction of allocable expenses, are received from the members as charitable contributions. In this regard, the Endowment mails a notice to each individual insured every year, informing the member of the percentage of his or her gross premium payment for the prior year that the Endowment alleges constitutes a charitable contribution. In determining the percentage that constituted the alleged charitable contribution, the Endowment deducts the expenses allocable to the administration of its disability insurance program.

8. Effective June 1, 1978, plaintiff enrolled for a \$1,200 monthly disability benefit with a 30-day waiting period under the Endowment's group disability insurance program underwritten by Mutual of Omaha. When plaintiff enrolled for coverage under the group disability insurance program, he reviewed Endowment literature and signed a statement on the application form agreeing that any

retrospective rate credits apportioned to the disability insurance program by Mutual of Omaha would be paid to the Endowment.

9. Since enrolling in the group insurance program, plaintiff has paid the applicable gross premium each year. During the period in dispute, plaintiff paid semiannual premiums of \$90 on (or about) November 1, 1979; May 1, 1980; October 30, 1980; April 21, 1981, and October 29, 1981.

10. In June 1978, the Endowment stated to certain of its members in a letter, attaching a brochure entitled Security Update (Exhibits 840A and 837, true and accurate copies of which are attached hereto) that the DID/ESP programs "can be an important hedge against the constant risk of income loss through disability, and against escalating hospital expenses, with the economy of group rates."

11. Attached hereto as Exhibit 8000 is a true and correct copy of a brochure and attached letter both entitled *Plan Ahead For Protection-Disability Income Dollars (DID)* which was sent by the Endowment to certain insured members.

12. In 1981, plaintiff received a written notice from the Endowment, which had received an experience credit from Mutual of Omaha, advising him that, in the opinion of the Endowment's auditors and counsel, each insured member had in 1981 made a contribution to the Endowment of 28.0 percent of any disability insurance premiums paid in the period from November 1, 1979, through October 30, 1980. The Endowment further advised in the notice that the Internal Revenue Service had ruled that members were not entitled to charitable contribution deductions for any portion of their premium payments.

13. Plaintiff, in filing his federal income tax return for 1981, did not claim a deduction for any portion of the gross insurance premium paid to American Bar Endow-

ment. Plaintiff subsequently filed a claim for refund, contending that he was entitled to an additional charitable contribution of \$50.40 with respect to experience credits paid to the American Bar Endowment. The instant suit followed.

14. Attached as Exhibit No. 8001 are the answers of plaintiff Frederick G. Boynton to defendant's first set of interrogatories.

PART II

Neither party proposed any stipulations in *Boynton v. United States* which they wish to address in this part of the Memorandum Re Stipulations.

Dated: October 5, 1983

Respectfully submitted,

The United States

Frederick G. Boynton

By /s/ B. JOHN WILLIAMS, JR. By /s/ FRANCIS M. GREGORY, JR.

B. John Williams, Jr.

Francis M. Gregory, Jr.

Acting Assistant

Attorney General

In the United States Court of Claims

Docket No. 351-83 T

HERBERT C. BROADFOOT, II AND
NANCY L. BROADFOOT, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

JOINT MEMORANDUM RE STIPULATIONS
SUBMITTED PURSUANT TO AOGPBT XVI

(Filed: October 6, 1983)

PART I

The undersigned parties, by their counsel, hereby stipulate and agree that, for the purposes of this action only, the following facts shall be taken as true, subject to the right of either party to introduce evidence not inconsistent with any of these stipulated facts.

1. This is a suit for refund of \$40 in tax, plus statutory interest, for the tax year ended December 31, 1981.

2. Plaintiff* is a member of the American Bar Association, a professional membership association for lawyers. The Association has been found by the Internal Revenue Service to be exempt from federal income taxation under Sections 501(a) and 501(c)(6) of the Internal Revenue Code. Plaintiff is also a member of the American

* For clarity in this stipulation, "plaintiff" will refer to Herbert C. Broadfoot and "plaintiffs" will refer to Herbert C. Broadfoot and Nancy L. Broadfoot.

Bar Endowment, by reason of his membership in the American Bar Association. The Endowment is an educational and charitable membership association which also has been found by the Internal Revenue Service to be exempt from federal income taxation under Sections 501(a) and 501(c)(3) of the Internal Revenue Code. The Endowment's by-laws provide that all members in good standing in the American Bar Association are members of the Endowment.

3. Since the mid-1950's, the Endowment has sponsored a group insurance program for its members as a means of obtaining additional funds for its charitable purposes in the field of law.

4. During the taxable year involved, and since the insurance program was first initiated, the Endowment was the group policyholder of group life insurance policies underwritten by New York Life Insurance Company. This group insurance was available to all Endowment members who were eligible to enroll in the life insurance program.

5. Pursuant to the terms of these policies, dividends were paid to the policyholder (*i.e.*, the Endowment) by the New York Life Insurance Company. The group policies with New York Life Insurance company expressly provided as follows until June 1, 1981:

On each policy anniversary to which this policy has been continued by payment of all premiums due, the divisible surplus, if any, ascertained and apportioned to this policy as a dividend shall be paid in cash to the Association, or upon its written request may be applied towards the payment of any premiums hereon.

6. As a condition to enrolling in the group life insurance program, the Endowment has required that each individual insured sign an application stating that any dividends apportioned to the policy or policies will be paid to the American Bar Endowment.

7. The Endowment contends that the dividends, after deduction of allocable expenses, are received from the members as charitable contributions. In this regard, the Endowment mails a notice to each individual insured every year, informing the member of the percentage of his or her gross premium payment for the prior year that the Endowment alleges constitutes a charitable contribution. In determining the percentage that constituted the alleged charitable contribution, the Endowment deducts its expenses allocable to the administration of its life insurance program.

8. Effective December 1, 1972, plaintiff enrolled for \$50,000 of life insurance coverage under the Endowment's group life insurance program underwritten by New York Life Insurance Company. Plaintiff had earlier enrolled for a lesser amount of coverage. When plaintiff enrolled for coverage under the group life insurance program, he reviewed Endowment literature and signed a statement on the application form agreeing and acknowledging that any dividends apportioned to the life insurance program by New York Life would be paid to the Endowment.

9. Since enrolling in the group insurance program, plaintiff has paid the applicable gross premium each year. During the period in dispute, plaintiff paid semiannual premiums of \$98.25 on November 30, 1979, May 27, 1980, and November 28, 1980. Plaintiff paid a semiannual premium of \$83.07 on June 1, 1981 and November 23, 1981. In 1979, dependent spouse and child coverage offered through the Endowment was increased. The Endowment also advertised a special 45-day period wherein uninsured members under age 50 could obtain \$20,000 of coverage without medical evidence of insurability. In 1981, New York Life reduced premium rates on certain parts of the Endowment Plan and increased maximum life insurance benefits.

10. In 1981, plaintiff received a written notice from the Endowment, which had received a dividend from New York Life, advising him that in the opinion of the Endowment's auditors and counsel, each insured member of the Endowment had in 1981 made a contribution in 1981 of 55.4 percent of any life insurance premiums paid in the period from December 1, 1979, through November 30, 1980. The Endowment further advised that the Internal Revenue Service had ruled that members were not entitled to charitable contribution deductions for any portion of their premium payments.

11. Plaintiffs, in filing their joint federal income tax return for 1981, did not claim a deduction for any portion of the gross insurance premium paid to American Bar Endowment. Plaintiffs subsequently filed a claim for refund, contending that they were entitled to an additional charitable contribution of \$108.86 with respect to dividends to the policyholder paid to the American Bar Endowment. The instant suit followed.

12. Attached as Defendant's Exhibit No. 8002 are plaintiffs' responses to defendant's first set of interrogatories.

PART II

Neither party proposed any stipulations in *Broadfoot v. United States* which they wish to address in this part of the Memorandum Re Stipulations.

Dated: October 5, 1983

Respectfully submitted,

The United States

Herbert C. Broadfoot, II
and Nancy L. Broadfoot

By /s/ B. JOHN WILLIAMS, JR. By /s/ FRANCIS M. GREGORY, JR.

B. John Williams, Jr.
Acting Assistant
Attorney General

Francis M. Gregory, Jr.

In the United States Court of Claims

Nos. 465-82T, 163-83T, 190-83T, 320-83T, 351-83T

AMERICAN BAR ENDOWMENT, et al., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT

EXCERPTS FROM TRANSCRIPTS OF PROCEEDINGS
OCTOBER 11, 1983 THROUGH NOVEMBER 11, 1983

[164] THE COURT: So your theory of the case is that the Endowment buys insurance wholesale, so to speak, and then sells it at retail to its members?

MR. DENNIS: Yes, and during Dr. McGill's deposition he indicated that this was a proper way of looking at the transaction. But they are in fact a middleman, marketing insurance to a group of individuals.

THE COURT: What is the service they are providing? Does it happen to be middleman?

MR. DENNIS: Yes, the service that they are providing is insurance to their members. That is the service that is being provided, in the same sense that any middleman—that DAV is providing a service. They provided books and trinkets to the public. The fact that one might not have title, as a middleman, to goods or services, doesn't make any difference, concerning what you are marketing. You are still providing a particular product to the public. And that is what the Plaintiff is doing in this case.

* * * * *

[186] Whereupon,

RONALD J. FOULIS

was called as a witness by counsel for Plaintiff and, having been duly sworn by the Trial Judge, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. THROWER:

Q. Mr. Foulis, will you please give your full name and place of residence?

A. I am Ronald J. Foulis and I live in Santa Rosa, California.

MR. THROWER: Your Honor, in accordance with your suggestion that we undertake to accelerate this portion of the testimony, I will ask the witness to refer to notes and on occasion read his notes in regard to the preliminary background information that I will be asking him about.

THE COURT: That is appreciated.

BY MR. THROWER:

Q. Will you give a brief summary of your professional background.

A. I was born in St. Louis County, Missouri in 1904, attended Washington University School of Law and graduated in 1927. Admitted to the Missouri Bar in 1926; I was associated with two law firms in St. Louis [187] from the time of graduation until 1941 when I became a partner in the firm of Orr, Pflaeger & Foulis. In 1944 I was attorney for the Southwestern Bell Telephone Company in St. Louis until 1953. And then I became an attorney for American Telephone & Telegraph Company in Washington, D. C. until my retirement from the company in 1969.

Thereafter, I was of counsel to Morgan, Lewis & Bockius in Washington until the end of 1974. I am a member of the Missouri Bar, the District of Columbia Bar, the American Bar Association, the Bar Association of Metropolitan St. Louis, the Federal Bar, the Federal Communications Bar, The American Law Institute, and I am a Fellow of the American Bar Foundation. My major

Bar activity is in the American Bar Association, I have been a member since 1933. In fact, I just recently received a certificate stating I had been a member for 50 years.

I was Chairman of the Junior Bar Conference, which is now known as the Young Lawyers Section, in 1938 and '39. I was Assistant Secretary of the American Bar from 1945 to 1947. And I have served in the House of Delegates, mostly as an assembly delegate, from 1939 to 1944 and again from 1960 to 1975. I was a state delegate from Missouri from 1950 to '53. I [188] have been chairman or a member of quite a number of ABA committees, the latest of which I served as chairman of a special committee to study legal education, namely law school education for a 7 year period, from '74 to '82.

While in St. Louis I was an officer and a member of the executive committee of the Association, served as chairman of a number of committees, particularly a special committee on judicial selection and tenure and we drafted the Missouri Court plan, so-called non-partisan Court plan.

As to my civic and governmental activity, I was chief price attorney for eastern Missouri under the Office of Price Administration in '42 and '43, and a civilian member of an Air Force Evaluation Board in the Mediterranean theater in 1944 and '45. I am a vice-chairman of the Jefferson National Expansion Memorial Association and was Secretary of the United States Territorial Commission, excuse me, United States Territorial Memorial Expansion Commission, which is a governmental commission overseeing the riverfront in St. Louis where the arch was built and now stands.

I have been a member of the school board in the Ladue School District in St. Louis County for a [189] period of 6 years, '47 to '53, and was later chairman of the board of trustees of a private school, Hawthorne School, here in the District of Columbia.

Q. Would you review briefly what positions of responsibility you have held in the American Bar Endowment?

A. In 1951 I was elected Secretary of the American Bar Endowment and in 1956 was elected to the board, as a member of the board. I have served in that capacity until 1977, when I became an emeritus member of the board. I have been vice-president and president of the Endowment. I have served as a member and chairman of the Investment Committee, and also the Insurance Committee at an earlier date. In fact I am still Chairman of the Investment Committee, although I am an emeritus member.

Q. Has the Endowment always had the name American Bar Endowment?

A. It was originally known as the American Bar Association Endowment and during my term as president I arranged to drop the name "association" and change the name to its present name.

Q. In what year did the Endowment begin its group insurance program?

A. In 1955.

[190] Q. Could you briefly summarize its history prior to that date, as you understood it?

A. I am sorry?

Q. Could you summarize the history of the American Bar Endowment prior to 1955?

A. Oh, yes, in February, 1955 a special meeting of the board was—

Q. I beg your pardon. Could you summarize very briefly the history of the Foundation in the years prior to 1955, what was the Foundation doing before it adopted—

A. You are referring to the Foundation, not the Endowment?

Q. I mean the Endowment.

A. Well, the Endowment was organized in 1942 for the purpose of soliciting gifts and bequests to provide charitable work under its charter in the field of law, and

had no organized program to raise money, and during the period from '42 up until the late forties they had probably raised 15 or \$25,000, small amounts, in total.

Then about '49 or thereabouts, William Nelson Cromwell, an attorney in New York, died and left a bequest in his will which totalled approximately \$400,000. That bequest came to the [191] American Bar Endowment. The American Bar Association had occasion to move its headquarters from Dearborne Street to a more commodious location and the University of Chicago offered them a site on which to build a building. They asked the Endowment to turn over this \$400,000 to them for that purpose. The board did not do so immediately because the bequest was for the purpose of establishing a library and the directors were not about to relinquish their responsibility without knowing precisely what the plans were. Because of some delay and all, the American Bar Association decided to create the American Bar Foundation, which would hold title to this building and be responsible for engaging in research programs.

So by the end—in the early 1950s the situation was such that the grant of \$400,000 had been given to the American Bar Foundation for the purpose of building a library building and the Endowment board was discussing the necessity of raising money for charitable purposes in order to help support the Foundation in its activities.

Q. At the time of the construction of the building, was there any call on American Bar Association members for contributions to support the [192] research center?

A. The American Bar Association put on an organized campaign to raise money from its members and others and I recall at that time many of us made what contribution we could afford to make for that purpose.

Q. As Secretary of the Endowment, did you attend meetings of the board?

A. I attended all of the meetings of the board with very few exceptions.

Q. When and where did you first hear a group insurance program discussed at an Endowment board meeting?

A. In February, 1955 a special meeting of the board was called at the request of Lloyd Wright, who was then president of the American Bar Association. I was not present at that meeting but as Secretary, I had the responsibility of seeing that the minutes were prepared and placed in my custody.

The minutes reflected that at that meeting the American Bar Association requested the board of the Endowment to consider or to take action to make a proposed contract of group life insurance with the New York Life Insurance Company effective. And the board—in fact at that time Mr. William Clark Mason of Philadelphia who had been chairman of an ABA special [193] committee to see what could be done in the way of raising funds to support the Foundation presented a specimen draft of a contract with New York Life Insurance Company to the Endowment board, along with a form of application for coverage by the members under such a contract.

The board resolved that they should enter in such a contract and authorized the officers to sign the necessary papers.

Q. Let me ask, was Mr. Mason a member of the board of the Endowment?

A. He was not.

Q. Let me ask you to describe briefly the fundamentals of the plan as presented by Mr. Mason.

A. Mr. Mason told the board at that meeting and again at another meeting in August of 1955 that the Endowment might persuade its members who were interested in applying for this insurance to name the American Bar Foundation as a beneficiary under their policy, which

could possibly provide funds for the research purpose of the Foundation and the support of the building, and that furthermore, dividends which would accrue under the group policy and be assigned to the Endowment by those members, could provide additional funds, which would in the first instance [194] meet the expenses of setting up the plan and creating it and subsequently to carry out the charitable purposes of the Endowment, itself.

Q. Was there any contemplation of calling on the insured members for contributions in any other way?

A. No, simply that when they applied for their insurance they would agree that any refunds of their premiums in the form of dividends would become the property of the Endowment to carry out its charitable purposes, which were in the field of law.

Q. Was there any proposal that members be asked to make the Endowment the beneficiary under the policy?

A. Not the Endowment, but the Foundation.

Q. Was this viewed as an established plan of charitable fund-raising or presented as an experiment?

A. Well, I don't believe anybody had ever seen a plan of this sort adopted before, and Mr. Mason said that he had approached a number of insurance companies to see if they would be interested in providing a group plan of this sort and finally had persuaded them to take it on and they had no experience with such a plan before.

Q. When was the proposal next considered at a meeting of the board of the Endowment?

* * * *

[197] BY MR. THROWER:

Q. Where did the Endowment get the funds to launch the program?

A. As is reflected by the resolution at the August, 1955 meeting, the American Bar Association provided the serv-

ices of its employees and advanced necessary funds to the Endowment in order to get the program established and underway.

Q. Where did they get the staff assistance to launch the program?

A. These were the employees of the ABA.

The Endowment had no staff.

THE COURT: Did you give copies of those exhibits to the reporter?

MR. THROWER: I did not. I apologize for that oversight.

MR. GREGORY: Would it be helpful for Your Honor, we have a form. We don't have extra copies with us right now, but we have a form for exhibits. Would you be interested in having that or does the Court use its own form for noting what has been checked off?

THE COURT: I have my own form which I keep track of. I would be happy to use someone else's form [198] if you have one.

MR. GREGORY: We will get that for you. We have just a few exhibits today and we will get that for you, Your Honor.

THE COURT: This is just my handwritten form. It would be helpful because if there is a question as to what has been admitted, that would be helpful. But the reporter comes first.

BY MR. THROWER:

Q. Did I understand you to testify as to whether or not the board at the August meeting approved the proposal presented by the American Bar Association?

A. They did. It was adopted.

Q. Can you tell us what happened at the meeting of the members, when that meeting was held and what happened?

A. That meeting was held on the following day, no, two days later, the 22nd of August, following the meeting of the assembly of the American Bar Association when the meeting of the members of the Endowment was held. And the president advised the members at that time that the Cromwell bequest of \$400,000 had been paid over to the American Bar Foundation to be used in constructing a library; that [199] The Foundation would in the future require funds to acquire and maintain this library and that the Endowment, at the request of the ABA, had entered into this contract with the New York Life Insurance Company for group insurance on the lives of the members; and that the result would be payment of dividends, which would otherwise accrue to the members, to the Endowment; and that the expenses of setting up the plan would be repaid out of these dividends.

Q. By reason of your attendance, did you attend also the meeting of the members of the Endowment?

A. I did, and prepared the minutes as Secretary.

Q. By reason of your attendance at the board meeting in August are you familiar with the reasons of the board for acting on and approving the proposed resolution?

A. I am.

Q. Did the proposal reflect any assumption of significant financial risk on the part of the Endowment?

A. We did not believe so.

Q. What was intended as the principal beneficiary if any principal beneficiary of the program?

A. The principal beneficiary was to be the [200] American Bar Foundation.

Q. Did Mr. Mason make any prediction as to what might be realizable from the dividends?

A. Yes, it turned out he was a little over-optimistic as to how much would be the result of asking members to name the Foundation as a beneficiary under their policy

and he also proved to be not a very good prophet because he said he thought the dividends might eventually amount to as much as \$100,000 a year.

Q. Within what time were those predictions exceeded?

A. Within two or three years. As I recall, having reviewed the minutes recently, we received in 1957 approximately \$77,000 from dividends. In the following year \$144,000, and the year after that some \$300,000. And they continued to increase every year thereafter.

Q. Let me ask you a few questions as to how the plan worked in very broad outlines.

Who served as a group policyholder?

A. In the life program, the New York Life Insurance Company is the insurer, the insuring company. And the Endowment is the policyholder. We entered into the contract with New York Life. Then as members we apply for the insurance, the Endowment would issue [201] certificates of participation to each member.

Q. Where did the money come from to pay the premiums?

A. From the members.

Q. And then to whom was that payment made?

A. The payment was made to the Endowment, which received them and accumulated them and then paid them over to the insurance company.

Q. And, under the plan who received the dividends or premium refunds, if any, from the insurance company?

A. The Endowment received those.

(Mr. Rubloff enters the room).

Q. What was done with those premium refunds?

A. They were used first to pay the expenses of administering the program. But after that all residue was used for the purpose of making grants to applicants; at first primarily the Foundation.

Q. You stated I believe in your testimony that it was contemplated as part of the plan that the members would be asked to assign their rights in these dividends to the Endowment. Was that continued in later years?

A. Yes, it has always been continued. We have always had that provision in the application.

[202] Q. Why were the members asked to assign dividends to the Endowment?

A. If they didn't assign them, we believed that they were the property of the individuals who had paid the premium because it amounted to a return of premium.

Q. What obligation, if any, did the board recognize upon receipt of the premiums from the members?

A. Well, the board felt that they were fiduciaries and were committed to use these funds in the way that they had represented to the members they would be used, namely for the charitable purposes of the Endowment.

Q. What obligation, if any, did the board recognize with respect to dividends when they were received back from the insurance company?

A. The same answer that I just made, that this was an obligation of the board that they had made to the members to carry out the charitable purposes of the Endowment through the use of these dividends.

Q. In what field?

A. In the field of law.

Q. Now, was there any commitment, as recognized by the board, to the American Bar Association to carry out the program in the manner you have described?

[203] A. That was the American Bar Association?

Q. Yes.

A. We had agreed at the request of the American Bar Association to enter into this contract and to sell the insurance to our members with the return of dividends to the Endowment to carry out our purposes, and I suppose that was a commitment.

Q. Have these concepts of the board, and understanding of the board, to which you have testified with respect to the obligation on the receipt of the premiums from the members, the fiduciary obligation to pay them over to the insurance company, the obligation to apply upon receiving the premium refunds from the insurance company, continued throughout the later years?

A. They have been, yes.

Q. And the understanding with respect to the commitment to the American Bar Association is to carry out the program in this way?

A. That's correct.

Q. From the beginning what was the intent and purpose of the board in operating the group insurance program?

A. Well, the intent and purpose at all times was to obtain funds which could be used to make grants [204] in the furtherance of its charter purposes.

Q. What was the policy of the board, if any, regarding providing services for members?

A. The policy of the board was not to provide any service to members because we didn't think we were authorized to do so and if we had done so we would jeopardize our 503-C status.

Q. Has that policy continued to the present date?

A. At all times.

Q. Can you give any examples of the exercise of that policy in discussions with respect to the amount of the premiums, the gross premiums to be charged to the members?

A. Definitely, the board at all times wanted to be certain that the dividends under these policies would be substantial, and any suggestion, I don't recall one being made, but had any suggestion been made that we cut the costs of the insurance, the premium, down to the point where there would be no dividends, we would not have considered it for a moment.

As a matter of fact, there were occasions when we were asked to consider undertaking additional insurance programs, such as there were one or two [205] instances of travel insurance, professional liability insurance and that sort of thing, and when we determined that we could not generate dividends from the participants, we immediately rejected any consideration of those plans.

Q. Relatively, what size dividends were you insisting upon before you would agree to enter a plan, substantial or minor?

A. Substantial dividends, yes. In other words, we were not willing to undertake a program that was simply for the convenience of our members. In other words, to service the members.

Q. On what occasions does the board meet?

A. The board has a regular stated meeting at the time of the annual meeting of the American Bar Association every year, and in addition, it generally meets at the time of the mid-Winter meeting, sometime during the Spring and another time during the fall.

Those are periods when the applicants for grants from the Foundation or the American Bar Fund for Public Education have submitted their requests and we want to consider them.

Q. The representatives of those organizations attend your meetings to make presentations?

A. Generally there are representatives of both [206] the Foundation and of the American Bar Associations Fund for Public Education. At least one of those meetings every year.

Q. I will ask you, if you would, to describe Plaintiff's Exhibit — identify and describe Plaintiff's Exhibit No. 267.

A. These are the Articles of Incorporation of the Endowment reflecting amendments through August, 1977.

Q. Are the purposes of the Endowment set out in the articles?

A. Yes, they are.

Q. There is a brief statement. I would like to ask the witness to read, if he would, the purposes of the Endowment as set out in paragraph 2 of the articles, read it into the record, read it to the Court, if you would.

A. Paragraph 2 reads, "This corporation is organized exclusively for charitable, educational, literary, religious and scientific purposes, including for such purposes as the making of distributions to organizations that qualify as exempt organizations under Section 501 3-C of the Internal Revenue Code of 1954, or the corresponding provision of any future United States internal revenue law. Within the [207] foregoing the corporation's purposes in part are to advance legal studies and research and to promote the administration of justice and uniformity of judicial decision throughout the United States."

Q. Mr. Foulis, what has been the regularity of your attendance of meetings of the board?

A. I have attended virtually every meeting that the board has had unless I have been ill or something of that sort.

MR. THROWER: Your Honor, it has been stipulated I believe that this exhibit is admissible. I would like to offer it in evidence at this time.

THE COURT: Okay It is admitted pursuant to stipulation.

(The document referred to, previously marked Plaintiff's Exhibit No. 267 for identification, was received into evidence.)

BY MR. THROWER:

Q. At these board meetings has a proposal ever been made to terminate the charitable programs of the Endowment?

A. No.

Q. At the annual meetings of the members has there ever been a proposal made, by any member, to [208] ter-

minate or to study the termination of the charitable aspects of the group insurance program?

A. No.

Q. At the meetings of members, has there ever been a complaint that a member did not understand the program?

A. No, there never has.

Q. At meetings of the members, has there ever been a request from any member that the Endowment adopt the practice of returning the premium refunds to members or giving them an election as to whether to receive them or not?

A. No, there has not.

Q. Have you had occasion, over these years, to discuss the Endowment's program with members from time to time?

A. Occasionally.

Q. Have you ever heard a complaint from a member that he did not understand when he made a premium payment that a portion of it constituted a contribution for charitable purposes in the field of law, to be applied by the Endowment?

A. No, I have not.

Q. What policy, if any, did the board have with respect to keeping members of the Endowment advised as [209] to the charitable program, the amount of money raised and how it was applied, the beneficiaries receiving it?

A. At every annual meeting of the members, the president would make a statement of the operation of the Endowment during the year, the funds received, the grants made, and in more specific terms, the president or treasurer would frequently prepare a more complete statement and have it published in the American Bar Journal.

Q. As to the commitment to use the premium refunds in the field of law, to which you have testified, as a formal officer and member of the board what would have been your reaction to a proposal that the premium refunds be used for charitable purposes not in the field of law?

A. I would reject it immediately because it would not be within our chartered powers to do so or the commitments we had made to the members of the Endowment.

Q. Have you, during past years, had any ABE group insurance?

A. I did at one time, yes, in the so-called junior plan, in the early years, particularly. When I reached the age of '70 or thereabouts I didn't want to continue it.

* * * * *

[235] Q. But in order to achieve that major purpose, didn't the board believe it was necessary to gauge the level of pricing of its insurance programs to fit within the competitive field of items available to its members, so that they would enroll?

A. We wanted to make these policies attractive to the members so long as it would result in increased dividends to us. And if it wasn't going to ultimately or basically increase the dividends, we were not as enthusiastic about it, and unless it did produce dividends of substantial amount, we were not interested because we wanted to avoid any situation where we would be said to be providing a service to the members of the Endowment.

Q. Was one of the significant considerations in increasing the amount of dividends one of getting increased enrollment in the plans?

A. Yes.

[236] Q. And pricing would have been an important consideration in attempting to increase enrollments in general, is that true?

A. Yes, we wouldn't expect members to pay an outrageously high price for insurance just to give us a dividend?

It would be much easier to go to them and say, "Make a contribution to us."

MR. MARKHAM: Thank you. Your Honor, we would move the admission of Exhibit 1740 into evidence.

THE COURT: Has that been subject to stipulation?

MR. THROWER: No objection, Your Honor.

THE COURT: No objection? Very well, admitted without objection.

(The document referred and previously marked Plaintiff's No. 1740 for identification and received into evidence.)

MR. MARKHAM: Thank you, Mr. Foulis.

* * * * *

[243] MR. THROWER: The next witness is William Reece Smith, Jr.

Whereupon,

WILLIAM REECE SMITH, JR.

was called as a witness by counsel for Plaintiff and, having been duly sworn by the Trial Judge, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. THROWER:

Q. Would you please give your name and place of residence?

A. My name is William Reece Smith, Jr. I reside at 11 Ladoga, L-a-d-o-g-a, Avenue, Tampa, Florida.

Q. Would you please provide for the Court a [244] brief summary of your professional background and public service activities and, here, Your Honor, again I have asked the witness to look at notes and such writings as he has prepared in that connection?

A. I don't have any.

I graduated from the University of South Carolina with a BS degree in naval science and from the University of Florida College of Law with an LLB degree I was called to the Bar in Florida in 1949 and admitted to practice in that state in various Federal courts including the Supreme Court of the United States. I taught in the College of Law of the University of Florida and was on the faculty of law of Stetson University as an adjunct professor.

Shortly after commencing the practice of law in Tampa, Florida in 1953, I have practiced law in Tampa, Florida with the firm now known as Carlton Fields, Ward, Emmanuel, Smith & Cutler, of which I am chairman since 1953. That is a firm of 100 or more lawyers with offices in 4 Florida cities.

I have practiced with that firm continually since 1953 with the exception of about a year and 1/2 in 1976, '77, when I served as interim president of the University of South Florida, and a period of about two years from '79 to '81, when I was president elect and [245] then president of the American Bar Association.

I have been active in the affairs of the organized Bar since the middle '50s. Among other things, I have served on the board and as president of the Hillsborough County, Florida, Bar Association; on the board and as president of the Florida Bar; on the board and as president of the Florida Bar Foundation; on the board and as president of the Florida Legal Services, Incorporated, which is a statewide program for the delivery of legal services to the poor.

I have served on the council and as president of the National Conference of Bar Presidents. I have served on the board or the council of the American Law Institute, the National Legal Aid and Defender Association, the Inter-American Bar Association, the International Bar Association. I have been active in various community affairs in

Tampa, Florida, either holding the office of president or serving on boards of cultural, educational and civic organizations.

I have or now serve as a member of the board of advisors, or trustee of several law schools, colleges and universities. I have served as chairman of the State of Florida's Human Rights Committee, chairman of the Governor's Commission on Protection [246] and Advocacy for the Developmentally Disabled, and as chairman of the Joint Legislative Executive Study Commission for post-secondary education in the state of Florida.

Q. You have covered this beautifully but let me ask you if you had any special scholarship of note after finishing your college and law school?

A. I did post-graduate work at Oxford University in law as a Rhodes Scholar.

Q. Did you at any time have any engagement with the City of Tampa?

A. I served as city attorney of Tampa for a period of about 9 years while continuing as a member of my law firm.

Q. Could you give me a brief review of what your positions of responsibility, if any, have been in the American Bar Association?

A. I became a member of the American Bar Association about 1955, when I attended my first annual meeting. For a few years thereafter I was active in what was then known as the Junior Bar Conference of the American Bar Association, which was representative of all lawyer members of the association under the age of 36. I served as chairman of the Junior Bar Conference with the American Bar [247] Association about 1960, '61. And I represented the Junior Bar Conference in the House of Delegates in the American Bar Association for a couple of years commencing in 1961 and 1962.

I was appointed as Assistant Secretary of the American Bar Association in 1963 and served in that capacity until 1967.

I was elected Secretary of the American Bar Association in 1967, and served in that position for 4 consecutive one-year terms, until 1971.

I became president or was elected president-elect of the American Bar Association in 1979. Served one year as president-elect, one year as president, and one year as immediate past president. I served on a number of task force committees and commissions of the American Bar Association. And at different times chaired the ABA's Committee on assembly resolutions, the ABA's standing committee on the federal judiciary, the ABA task force on professional utilization and I presently chair the ABA's consortium on legal services and the public. I have attended all mid-year and annual meetings of the American Bar Association without exception since 1965, since 1955, correction. And I have been a member of the House of Delegates consistently since 1961 to the present date, with the [248] exception of the 4 years that I served as assistant secretary. I then sat with the House of Delegates but was not technically a member of it. I served on the board of governors of the American Bar Association for 7 years and sat with the board an additional 4 years as Assistant Secretary of the Association.

Q. Thank you.

Would you provide us a brief view of what positions of responsibility, if any, you have held in the American Bar Endowment?

A. I was appointed Assistant Secretary of the American Bar Endowment in about 1962. I served as Assistant Secretary until around 1971, when I was elected Secretary and became a member of the board of the Endowment. And I served as Secretary of the Endowment until about 1974. Vice-president of the Endowment from '74 to '76; as president of the Endowment from '76 to '78.

I served one additional year as a member of the board thereafter and resigned from the board when I became the president elect nominee of the American Bar Association. After I finished my service as an immediate past president of the American Bar Association, I was re-elected to the Endowment board and presently serve on it.

MR. THROWER: Your Honor, we had marked for [249] identification exhibit number 310, which is the biographical statement provided to us by the witness that he states is in current use. I do not have that presently with me. I would like to present that or offer that into evidence when we have it available, and I simply want to call that to your attention at this point.

BY MR. THROWER:

Q. Mr. Smith, from your observations and participation how much time do you find is spent by Endowment board members in the work of the Endowment?

A. It would vary to some degree, depending upon the responsibility of the individual member, particularly when the member becomes an officer, but I would say on the average of from one month to 6 weeks of a given year would be devoted to Endowment work.

Q. By each member?

A. By each member, yes.

Q. Are the board members paid for this service?

A. They are not.

Q. What is the American Bar Association?

A. The American Bar Association is a voluntary organization of lawyers, membership now in excess of 300,000. It's the largest organization of its kind in the world. It is generally regarded as the national [250] spokesman for the legal profession in the United States. Any person licensed to practice law in the United States, who is in good standing with the Court of admission, may upon application become a member of the American Bar Association, upon the payment of dues.

Q. Approximately what portion of the total lawyers of the United States admitted to practice are members of the American Bar Association?

A. At least 50 percent.

Q. I will ask you to identify and describe what has been marked as Exhibit No. 170.

MR. THROWER: Your Honor, I believe that the Defendant has copies of this. We will provide copies, the copy that Mr. Smith has, to the Court reporter.

THE WITNESS: This is a copy of the constitution and bylaws and the rule of procedures of the House of Delegates of the American Bar Association for the fiscal year or administrative year of 1980, 1981.

BY MR. THROWER:

Q. Were the constitution and bylaws substantially similar to this for the preceding two years?

A. Yes, they are.

MR. THROWER: I would like to offer this [251] into evidence, Your Honor.

THE COURT: No objection?

MR. MARKHAM: No objection, Your Honor.

THE COURT: It's admitted.

(The document referred to, previously marked Plaintiff's Exhibit No. 170 for identification, was received into evidence.)

BY MR. THROWER:

Q. What is the leadership of the American Bar Association?

A. The leadership of the American Bar Association might be variously described, depending on the individual who is asked the questions, but it is most certainly the officers, the members of the Board of Governors, the members of the House of Delegates, the chairs of the divisions, sections and committees of the Association. There are some of us who believe that the staff is predominantly the American Bar Association.

Q. What is the constituency of the Board of Governors? Who are they and how are they selected?

A. There are 23 members of the Board of Governors, 6 of whom are officers of the Association. 17 are elected by the House of Delegates. 14 of those [252] 17 represent geographical areas of the country not dissimilar to federal judicial circuits. The additional 3 represent the sections and divisions of the Association. The Young Lawyer Division having a representative. The sections of the Association having representatives and the Judicial Administration Division having a representative.

Q. What is a constituency of the House of Delegates? Who are they and how are they selected?

A. The House of Delegates is really the governing body of the Association. It is the chief policy-making body of the Association. It elects the officers and directors. It is composed of I believe 384 members. 52 of those are known as state delegates and are elected by the ABA membership in the 50 states, the District of Columbia and Puerto Rico. The largest constituency group of the House of Delegates of the American Bar Association are those persons that we call state bar delegates, who represent state and local bar associations throughout the country. The number of state or local bar associations to which any state, — the number of delegates to which any state is entitled depends upon the number of lawyers in the particular jurisdiction.

In addition there are 15 members of the [253] House of Delegates, who are known as assembly delegates and are elected at annual meetings of the Association by all members of the Association in attendance at the meeting.

There are also members of the House of Delegates who represent some 19 affiliated organizations. In addition, certain past officers are ex officio members of the House of Delegates, as are all members of the House of Delegates

or of the ABA and certain governmental officials are also members, such as the Attorney General of the United States.

Q. How many lawyers participate in the leadership of the American Bar Association as you have described it?

A. The American Bar Association has something which is called the red book, which lists the officers, the leadership of the divisions, sections and committees, task forces, other things of that sort. There are probably somewhere between 4500 to 5000 persons listed in that red book. In addition, there are persons active in committee work of divisions and sections of the Association and at any given point of time there are probably 20 to 25,000 individual members of the Association actively involved in some work.

[254] Q. I will ask you to describe this red book which I am handing to you and which is marked Exhibit No. 166.

A. This is the red book of the American Bar Association, actually the directory, for the year 1980, '81. It contains the name and addresses of those persons who are sometimes referred to as the official family of the Association.

MR. THROWER: Your Honor, at this time I would like to offer that into evidence.

MR. MARKHAM: Your Honor, we would question the relevance of this document to the issues in the case.

THE COURT: You wouldn't or you would?

MR. MARKHAM: We would.

MR. THROWER: May I respond to that, Your Honor?

THE COURT: Go ahead.

MR. THROWER: Your Honor, the group insurance program of the Endowment that we are reviewing here was launched and has been operated in the context of the relationship of the American Bar Endowment to the American Bar Association and other charitable arms of the Association. In order to understand the relationship of the

association's [255] concerns in this program, the relationship of the members to this program, it is necessary, we think, to have a grasp and understanding of the total operations of the American Bar Association, the scope of them, and the relationship of the Association with its members, because they are either the insured members or potentially the insured members.

The Defendant wishes to put the group insurance program in the context of credit life insurance, about which the evidence will show there have been great abuses. Or to compare the Endowment to the Exxon Corporation, or to the American Express Company. We want to see the group insurance program viewed in its true light and relationships and therefore we think this and two or three other similar documents provide important documentary support for the view that we'll have.

THE COURT: I will admit it.

(The document referred to, previously marked Plaintiff's Exhibit No. 166 for identification, was received into evidence.)

BY MR. THROWER:

Q. How may a resolution be brought before the House of Delegates?

[256] A. Most basic way would be in the Assembly of the Association. The Assembly exists to provide a forum and a voice for all members of the Association, regardless of the extent of their participation in the work of the group. The Assembly meets annually. Any member of the American Bar Association may introduce a resolution in the Assembly. That resolution is referred to the Assembly Resolutions Committee. The meeting of the Assembly on the opening day of the annual meeting of the American Bar Association, which is the largest single meeting of the Association during the year, is attended by several thousands of lawyers and guests consistently, the resolu-

tions are reviewed at the assembly. That afternoon there are hearings on the resolutions and then the assembly votes on those resolutions.

Q. May I ask at that point is there provision for discussion of the resolution or debate of the resolution?

A. Oh, yes, both before the hearings committee and in the debates which take place in the Assembly on the resolutions themselves.

Q. What vote is required to adopt a resolution in the Assembly?

A. The majority of those present.

[257] Q. Excuse the interruption and please go ahead.

A. If the Assembly approves a resolution, it's then referred to the House of Delegates for the concurrence of the House. If the House concurs then the resolution becomes policy of the Association. If the House disagrees, the resolution would go back to the Assembly. And in the event the assembly could not concur with the House, then by a vote of the Assembly the matter is referred to the entire membership of the Association through a referendum by written ballot.

Q. Is that by mail?

A. Mail ballot, yes. That is the most basic way to introduce a resolution in the association.

The American Bar Association is composed of 3 divisions, Young Lawyers, Members of the Judiciary and the Judicial Administration Division are examples of them, some 21 sections, which vary all the way from economics of the law practice to international law, and have memberships as large as many as 60,000. Many of the sections of the ABA are bigger than state bar associations.

And in addition to the 3 divisions and 21 sections of the Association there are a large number of committees, commissions and task forces. Again at one time the number would surely exceed 70. Each of [258] these entities may propose a resolution to the House of Delegates in writing.

And upon a majority vote in favor of the resolution, the matter becomes policy of the Association. There is also a provision in the rules, constitution and bylaws, which provides that any Bar Association represented in the House of Delegates may on its own, without going through the association structure, introduce a resolution for action by the House of Delegates.

In addition to the 3 ways that I have already mentioned, the resolutions may also be introduced and acted upon by the Board of Governors of the Association, which is authorized to determine matters of policy when the House of Delegates is not in session, and recommendations from the divisions, sections and committees, or sometimes from the officers, may be brought to the Board of Governors for its action.

In fact, there is something called the Executive Committee of the Board of Governors of the Association, which is composed of the officers, plus the chairs of the 3 board committees, and that Executive Committee is also empowered to act upon resolutions to approve them and to make policy. But that is very rarely done.

[259] The other measures are used pretty regularly.

Q. Is there provision in the House of Delegates for discussion and debate of resolutions before the House?

A. There is, sir. Sometime ad nauseum.

Q. Are meetings of the House and of the Assembly open to the public?

A. They are open to the public and to the press and the media is generally present at all debates carried on in the Assembly and in the House of Delegates and the Board of Governors.

THE COURT: MR. Thrower, why don't we break for lunch.

MR. THROWER: Fine, Your Honor.

THE COURT: Make it two o'clock.

(Whereupon, at 12:00 noon, the luncheon recess was taken.)

* * * * *

[262] BY MR. THROWER:

Q. Mr. Smith, who presides over the meeting of the Assembly of the American Bar Association?

A. The president of the Association.

Q. Does the president dominate the proceedings of the assembly?

A. No, sir.

Q. Can you refer to any meaningful experiences as examples of that?

A. Well, when I was president of the Association an individual member of the Association offered a resolution that pertained to President Reagan's action during the air controllers strike. I believed that it was out of order as not being appropriate for consideration by the assembly. My ruling was appealed and overruled and the member presented the resolution successfully.

Q. Did it pass?

[263] A. It did, yes.

Q. What action did the House of Delegates take on it?

A. I believe they sustained it, Mr. Thrower, or rather approved it, although I am not certain.

Q. What are the objectives of the ABA, and I would ask you if you would to refer to Exhibit 170 which is already in evidence and Article 16 of that, perhaps you would want to read to the Court the statement of those objectives.

A. The purposes I think I know fairly well are to uphold the constitution of the United States and republican form of Government; to advance the science of jurisprudence; to advance the administration of justice; to further cordial relationships between the members of the legal profession; to enhance relationships between the national organization and state and local bar associations; seek to serve the public good. All is more fully and correctly stated in the exhibit.

Q. Could you briefly categorize those objectives as you have stated them?

A. The work of the American Bar Association per se generally divides into services and work that it does in connection with professional interests and [264] work that might be described as of public interest or public service.

Q. With respect to that latter group of activities of public service, I ask you to refer to Exhibit 335, and in a moment describe what that is.

A. This is a photostated copy of a document prepared by and published on behalf of the Public Service Activities Division of the American Bar Association. That division is composed of one section of the ABA that particularly is interested in public policy issues, the section on individual rights and responsibilities. It's composed of I guess 15 or 16 committees of the Association which work particularly in the public sector or relative to issues that are of broad public interest. And maybe 10 commissions and task forces that have commitments in that area as well. When I was president I think this particular division had a budget for its operation in excess of \$4 million annually. This particular document summarizes some of the public service activities in which the sections, commissions and other entities that are staffed by this division are involved. The document by no means comprises a summary of all of the public service activities of the American Bar Association, which are carried on not only by the association and its [265] committees but also by the divisions and sections.

One of the most active entities in the public service area is the Young Lawyers Division of the ABA, composed of lawyers under 36 years of age who now comprise about half the membership of the ABA. The group is no longer an old mossback organization but it has been youthened considerably

Q. I would like to offer that in evidence as Exhibit Number 335 at this time, Your Honor, as illustrative of public service activities of the Bar.

MR. MARKHAM: No objection, Your Honor.

THE COURT: Admitted without objection.

(The document referred to, previously marked Plaintiff's Exhibit No. 335 for identification, was received into evidence.)

BY MR. THROWER:

Q. With respect to what you categorize as the service of the American Bar Association to its members, does the ABA have any policy and practice regarding profiting on the services that it provides to members?

A. To my knowledge the ABA has never sought to make a profit on any services which it renders on behalf of the membership of the Association.

Q. Does the ABA, on occasions, secure services [266] for members or make arrangements for services for members from commercial sources?

A. Yes, the ABA as a service to members and as one of the entitlements of membership has negotiated with commercial organizations from time to time over the years and has for example obtained discounts on the purchase of office equipment, discounts on hotel accommodations, discounts in the rental car field, discounts for meeting places. It has sought to provide any number of continuing legal education programs that would cover the whole field of the interests of the legal profession of this country at cost. It has sought to provide a myriad of materials that had to do with law practice and law office economics and how lawyers can better fare in the practice of law. All of those things are done as service to membership and without a profit motive being involved.

Q. What is the American Bar Retirement Association?

A. The American Bar Retirement Association was established to provide a retirement program.

Q. Established by whom?

A. By the American Bar Association, to provide a retirement program for the staff of entities that [267] were affiliated with the ABA as well as the ABA itself, and in addition to that, to provide a body to administer retirement funds for individual lawyer members of the Association who wished to have such administration available to them. It started years ago very modestly and I think it probably now administers 3 quarters of a billion dollars a year. All of that is done as a service to those who participate without any charge whatsoever by the association.

Q. I may ask you to repeat yourself, but is there any profit to the association for the provision of these services by commercial agencies arranged by the American Bar Association?

A. No.

Q. Are there instances where the ABA does profit in dealing with commercial agencies?

A. To my knowledge, the American Bar Association has never sought to make a profit on anything that involved members and member benefits. On the other hand, the American Bar Association, if it has something to provide external to the association, might do so. As for example, the sale of the membership lists of the Association to commercial enterprises.

[268] Q. Can you state whether or not, in making that sale, any opportunity is given to ABA members to have their names removed from that list?

A. I don't think such an opportunity is provided. If so, I am not aware of it.

Q. When the ABA negotiates with commercial agencies for services to members, who or what represents the membership?

A. The officers and members of the board are elected by the membership through the structure of the Association and it's the duty of the officers and the members of

the board to represent the membership and to see that they are not only adequately but well represented in negotiations with commercial groups, such as the rental car situation. Negotiations might be carried on by one or more of the officers and members of the board, might be carried on by members of the Association in particular committee work that has special knowledge of the type of transaction at hand; might on occasion be carried on by paid consultants employed by the association to make certain that the membership interests are presented as well as possible.

The ABA is a big organization now. Is it [sic] has a great deal of leverage that it can use in [269] dealings of this kind, and it uses that leverage. In for example negotiating for convention space, special hotel rates, special air fares to go to meetings, a variety of things of that kind.

Q. As you have observed this type of representation, how would you appraise its effectiveness?

A. I believe it is quite effective

Q. Over the years in your activities in the ABA as you have described them, and in particular in your capacity as an advisor, was it ever suggested to the ABA that it introduce a low cost group insurance program as a service to members?

A. Yes, sir, that had been suggested.

Q. What was the source of the suggestion, and what was the nature of the suggestion? Who made the suggestion?

A. I remember the suggestion being made on at least one occasion by the membership committee of the Association. There have been very few occasions when members of the Association have written in, and, it might be said, urged a low cost service sort of oriented program.

Q. When this suggestion was made by the membership committee, what was the response of the [270] leadership of the ABA?

A. The leadership always carefully considers the requests and complaints and concerns of its members, and I really mean that. There is a great effort to do it. For example, as the president of the ABA, I always personally answered telephone calls from members to me and I always answered correspondence first and foremost. But the association consistently has declined to establish or support or institute in any way what you have described as a low cost insurance plan as a service to members.

Q. Can you tell us why that is the case?

A. Well, historically the American Bar Association asked the American Bar Endowment to institute the insurance programs which bring us here on this occasion. The primary purpose was not to sell insurance but to raise funds for charitable purposes. The American Bar Association, having asked the Endowment to undertake such a program, and the Endowment having developed such a program, and in the viewpoint of the leadership of the Association, done so successfully, so that the donations made by the certificate holders are of very significant meaning in the public service activities and research activities that are law-related in this country. This being so, [271] the leadership would not want to start a service, low cost service insurance program because it's inconsistent with that which it asked the Endowment to do, because it could create confusion because it is antithetical to the purpose for which the program was established in the first instance.

Q. Are you familiar with whether state and local bar associations have adopted group insurance programs for its members?

A. Slowly over the years they have done so. I believe I am correct in saying that there are some 50 state bar association life insurance programs now and at least 50 disability insurance programs. A vast majority, if not all of those programs, are what I would call service oriented

programs. They exist primarily to attract and hold membership. They have no other feature or no other purpose. They are entirely different in design and purpose and goal from that which the American Bar Endowment has developed over the years.

Q. As you understand it, do they undertake to profit from the sponsorship of those programs?

A. The state bar associations?

Q. Yes.

A. By and large no, they do not. They try to [272] provide the coverage at the lowest possible cost as a service.

Q. With what regularity have you attended meetings of the House of Delegates during your years of service in the House?

A. Constantly. I have never missed a meeting.

Q. And meetings of the Board of Governors?

A. When I served on the Board of Governors, the same was true.

Q. And meetings of the board of the Endowment when you were on the board?

A. I didn't do quite as well on the Endowment particularly in my earlier years because my career has been as a trial lawyer and in the earlier years I worked for older lawyers and when they told me to be ready for trial I was there and I missed some Endowment meetings.

Q. And could you state the extent of your attendance at board meetings, were you frequently absent?

A. Which board, Mr. Thrower?

Q. Of the Endowment, which you referred to.

A. I was absent on occasion during the period from '62 to '71 when I was Assistant Secretary. I don't think it was frequent, but it certainly occurred. [273] I did even better in my attendance during the period that I served as an officer of the Association, at least until the time that I became a candidate for president of the American Bar Association.

Q. And meetings of the Assembly of the ABA?

A. I have attended all meetings of the Assembly since 1955.

Q. And the annual meetings of members of the Endowment?

A. I have attended all annual meetings of the members of the Endowment since 1962.

Q. To your knowledge has any resolution ever been presented at any of these meetings to propose that a low cost group insurance program of service to members either be introduced or that the prospect of introduction of such a program be studied?

A. None have ever been introduced or even discussed.

Q. Any resolution, in the ABA meetings that you have just referred to, to terminate the group insurance program?

A. No, sir.

Q. Any proposal in any of the meetings that you referred to that an annual election should be given to ABA members to either take down or leave their [274] contributions, leave their premium refunds with the Endowment for charitable purposes?

A. No, sir.

Q. In what ways, if any, does the ABA support the group insurance program of the Endowment?

A. Well, it really gave it birth, which I suppose is considerable support. In addition to that, it provides, it nurtures it because it provides the total membership of the Endowment. It supports it in entirety, particularly in responding favorably to the public service programs and research programs, that the Endowment has carried on, in giving those programs appropriate publicity and recognition over the years.

The American Bar Foundation, which is the research arm of the American Bar Association, could not have existed but for the support of the American Bar Endowment and the ABA clearly recognizes and acknowledges this.

The ABA is aware of other interests, other associations whose welfare it is interested in, that have been and continue to be heavily reliant upon Endowment for support. Probably the National College for State Judges at Reno, Nevada, would not have become the success it has without the early support of the American Bar Endowment. The core administration [275] support of the National Legal Aid and Defender Association has come from the Endowment for many years.

The National College of District Attorneys receives vital support. There are others I could name. The Association recognizes the importance of all of these groups, many of which were inspired by and are nurtured by the Association.

It regards them not only to serve in the professional interests but in the broad public interests of this country and the Association appreciates the importance of the Endowment in sustaining activities of this kind

Q. Can you state whether or not you would consider that the forbearance of the ABA from introducing low cost group insurance programs as a service to members would be a type of support which the ABA gives to the Endowment?

A. No doubt that that is true.

Q. In your view could the Endowment have been launched or could the group insurance program of the Endowment have been launched or carried on without the support of the ABA?

A. I think not, sir

Q. As far as you know has any insured member of the Endowment ever complained to the Endowment [276] officers or board, at any of the meetings or otherwise, that when he paid his premiums he did not know of the charitable nature of the premium refunds?

A. I have never heard of such a complaint.

Q. By reason of your years of service with the board of the Endowment and as a [sic] officer are you familiar with the concepts and understandings of the board regarding the operation of the group insurance program during the years of your relationship with the Endowment?

A. Yes, sir.

Q. When premiums were paid to the Endowment by the members, what obligation, if any, did the board recognize regarding that money?

A. The board had a fiduciary obligation to receive that money and to pay it to the insurance carriers presenting the program.

Q. Why were the members asked to assign any premium refunds to the Endowment?

A. Because it has been the understanding from the beginning that were it not for the assignment, the so-called premium refund would be due to and should go to the individual certificate holders. That was the background against which group programs of this sort developed. It was the understanding of board members [277] that they were entitled to the premium refunds, as a matter of law or equity, and that the assignment was necessary because that was so.

Q. When the Endowment received premium refunds from the insurance companies, after expenses, what obligation, if any, did the board recognize regarding that money?

A. The program was conceived from the beginning as a method for it might be called small gift contributions in aid of the legal profession. The certificate holders or members of the Endowment were advised that if they made contributions to the Endowment, those contributions would be used in the area of research and public service in the field of law, and law related activities. This was the constant expression of the Endowment, the understanding of those who had helped create it, namely the

American Bar Association, and the Endowment leadership, if one wishes to call it that, felt committed to use the funds according to those undertakings consistent with the charter powers of the Endowment, and consistently over the years of the Endowment leadership the board did precisely that. As far as I know they never made a grant outside of the field of law.

[278] Q. Summing up, did the board consider the premium refunds to be profits after expenses or charitable contributions to the Endowment?

A. Charitable contributions. Have never been conceived as profits.

Q. On what basis were decisions made by the board as to what types of insurance to cover?

A. The board from time to time looked at various insurance programs over the years that I can recall. If the programs did not promise to provide what you have called here premium refunds of substantial circumstances; if they were high risk programs or offered low margin of return if one wants to call it that, the Endowment was not interested in it and did not pursue them further. Over a period of time the Endowment looked at things like Medicare supplements and travel care insurance. I am sure there are others. They don't come immediately to mind.

Q. Turning now in conclusion to the spending of the money by the American Bar Endowment, can you describe briefly the relationship of the ABA, the American Bar Foundation, the Fund for Public Education and the Endowment?

A. Well, the ABA is the voluntary organization of some 300,000 lawyers, which might, among those that [279] you have mentioned, be regarded as the parent organization.

The American Bar Foundation was created for the purpose and continues to serve as the research arm of the American Bar Association and the American legal profession.

The American Bar Foundation was created for the purpose and continues to serve as the research arm of the American Bar Association and the American legal profession.

The American Bar Endowment was created as the charitable arm of the national organization, each independent of the other serving in their respective areas. The Fund for Public Education is a less independent entity, a 501 C-3 organization created by the American Bar Association for the purpose of receiving and making grants appropriate within the confines of 501 C-3.

Q. Was its interest confined to the legal field or did they extend more broadly?

A. The Fund for Public Education?

Q. Yes.

A. Again, its activities are limited to matters of law. The distinction to be made between the activities of the American Bar Foundation, on the one hand, for example, and the Fund for Public Education on the other, is that the American Bar Foundation is interested in research activities. The Fund for Public Education is involved in programmatic [280] activities.

Q. What has been your principal interest on the board of the Endowment?

A. My interest more than anything else was in the grants activities of the Endowment and I suppose in seeking to assure that the contributions of the members were used effectively to advance research and public service in the field of law and beyond that to determine the priorities, because there were always or nearly always far more demands than there was money. Judgments had to be made as to where it could best be spent in the public interest and in the interests of the legal profession. Some of the best fights that I can remember within the Endowment related to decisions regarding priorities.

Q. In its grant-making is the board of the Endowment subservient to or subject to the directions of the ABA? Or is it independent of the ABA?

A. Not in the least. Frequently one would have to withstand the pressures of the given president of the American Bar Association, who had a project that he was particularly interested in.

Q. In providing—in responding to requests for grants, did the board study the reasons for which the money was requested or just turn it over?

[281] A. The board was very careful to assure that it understood in the first instance the purpose for which the grant application was made and the application that would be made of the funds if received. The board was very careful to assure that the grant was within the charter powers of the Endowment. The board was very careful to understand the merits of the application, and beyond that, to try to evaluate it in the overall picture of that, which was of law-related, public and professional concern at the time. And serving on the grants committee, which is one of the things I liked about it, one had to have a pretty broad knowledge of what was going on in the field of law and the legal profession in this country, and what was deemed to be of particular concern at a given point of time.

Q. Did the board, through the grants committee, follow up to see that the grants were extended in a manner consistent with the requests?

A. It did. It required oral or written reports, mostly written reports, to assure that the monies were spent for the purposes for which they were granted.

Q. What has been the policy of the board of the Endowment with respect to informing their members about the charitable programs of the Endowment?

[282] A. It was thought it would be very important to inform the members, since they were contributing their money to the Endowment for grant purposes. It was

regarded as very important that the Endowment keep the members advised of the uses to which the monies were being put, and assuring in effect the members that the fiduciary obligations of the Endowment were being properly discharged. And therefore, there were annual reports. There were separate mailings of the American Bar Endowment. There were reports published in the American Bar Association Journal, along with budgets. There were articles written in the American Bar Association journals. There were speeches made by officers of the Association, particularly the president of the American Bar Association, as he traveled about the country meeting with lawyers and Bar associations, talking about these activities and their importance to the public interest of this country and to the legal profession.

Q. Is the group insurance program of the Endowment the only way in which ABA members give money to charitable causes supported by the ABA?

A. No, it is not. It is the most effective small gifts program, obviously over a long period of time. The American Bar Association not long ago itself [283] completed a successful \$10,000,000 fund-raising drive, which was called the Second Century Fund. The American Bar Association is now developing an annual giving program. By and large these involve gifts of greater magnitude than those that are involved through the Endowment concept.

Q. And then are there also other ways — I need not ask you to enumerate them in detail unless you care to?

A. Well, the American Bar Foundation, for example, has something which it calls the Fellows of the American Bar Foundation, and it's regarded an honor to be invited to be a Fellow and one contributes \$1,000 for the honor, which goes to the support of the American Bar Foundation.

So there are a variety of ways in which one can give to the legal profession in this country, none with the consistency nor the concept of the Endowment.

MR. THROWER: That concludes my direct, Your Honor.

THE COURT: Okay, Mr. Thrower. Mr. Markham.

MR. MARKHAM: Thank you, Your Honor.

* * * * *

[297] Joseph W. Moran

was called as a witness by counsel for Plaintiff and, having been duly sworn by the Trial Judge, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. [sic] CARPENTER:

Q. Would you state your full name and business address.

A. Joseph W. Moran. My business address is 51 Madison Avenue, New York City.

Q. And by whom are you employed?

A. I am employed by the New York Life Insurance Company

Q. And what is your position?

A. My title is vice-president and actuary

Q. What is an actuary?

A. Well, an actuary is generally viewed as someone who uses mathematical principals [sic] and concepts, particularly as they relate to probability and statistics and time value of money to solve practical business problems, particularly in the area of insurance, but also in the area of other business [298] questions involving contingencies.

MS. CARPENTER: Your Honor, Mr. Moran is being offered by the Endowment not only as a fact witness but also as an expert witness and in the interest of saving time I have asked Mr. Moran simply to state for the Court what his education experience and qualifications are in the field of actuarial science.

He will be offered as an expert in group life insurance.

THE COURT: Is there likely to be an objection from the defendant?

MR. MARKHAM: No, Your Honor.

THE WITNESS: I have been employed by the New York Life Insurance Company since 1949, when I was hired after graduation from Yale, honors with exceptional distinction in mathematics. Throughout that period of time I have temporarily been assigned to various positions in New York Life's group insurance operations. Over 30 years I have had experience with underwriting various actuarial assignments, including responsibility for premium ratemaking and financial projections, and for a period of time I had full operating responsibility including sales for our association group insurance operations.

[299] I acquired my fellowship in the Society of Actuaries by examination in 1952. I became a charter member of the American Academy of Actuaries in 1965. Within the Academy of Actuaries I am a member of the Committee on Guides to Professional Conduct. Within the Society of Actuaries I have had several committee assignments through the years, including a 10-year stint on the Committee on Group Mortality and Morbidity, which conducted inter-company experience studies.

Most recently I have been, for the last 4 years, a consultant to the Society of Actuaries Committee on Examinations and Education Consultant on group insurance products.

MS. CARPENTER: With the record properly made we offer Mr. Moran as an expert in the field of life insurance.

THE COURT: In light of Mr. Moran's obvious qualifications and lack of objection, he is so qualified.

BY MS. CARPENTER:

Q. Mr. Moran, could you describe your duties during the period July 1, 1978 to June 30, 1981?

A. For the periods under discussion up through the end of April, 1981 I was the officer with [300] principal responsibility for New York Life's professional association group life and health insurance operations, including underwriting, actuarial, pricing, financial results and sales. During part of that time we were operating on a committee basis. I didn't have line responsibility for all of those activities but I was the chairman of the committee that all the activities reported to.

Beginning in the Fall of 1979, and extending through April of 1981, it was a line responsibility.

In May of 1981 I was transferred to a new assignment, staff position, and reported directly to the executive vice-president in charge of group insurance operations, and that is my present position and I handle certain special projects, particularly the area of long-range planning.

Q. Did your responsibilities during the period July 1, '78 to June 30, 1981, which I will refer to from here on out as the years in issue, include responsibility for the American Bar Endowment case?

A. Yes.

Q. Did you have the authority to determine the rates on that case?

A. Yes.

[301] Q. How long were you involved with the American Bar Endowment case?

A. My first involvement with the American Endowment Group Life Plan began in 1953.

Q. Can you tell me how you came to become involved in it?

A. William Clark Mason, who was the chairman of an American Bar Association committee that was undertaking the proposed development of a life insurance program visited New York Life's home office and met with several of the key people in our group insurance department.

Mr. Mason's idea was to devise a group insurance plan under which the American Bar Endowment could raise funds to be used for educational and research purposes. His proposal was that the fund-raising would be accomplished in two ways, that some members of the Endowment insured under the plan would designate the Endowment as the beneficiary for their life insurance coverage, and, above and beyond that, the Endowment as policyholder would be entitled to receive the dividends of the group insurance policy as might be payable by New York Life from time to time.

Q. Mr. Moran, at that time were you aware of any other group life insurance plan that had as its [302] purpose fund-raising.

A. I was not familiar specifically with any group life insurance plans that operated on that basis.

Q. And at that time did professional associations commonly offer life insurance to their members?

A. It was unusual for them to do so.

Q. And did the New York Life Insurance Company have any other professional association cases at that time?

A. No.

Q. During the years in issue, what companies were the leading companies in professional association insurance?

A. I would say in the late 1970s New York Life was probably the most prominent company that was active in the association group market. Since then Prudential has become quite active so that statement would not apply today, since Prudential is larger than New York Life. But in terms of relative levels of activity in association group New York Life undoubtedly had the largest volume of group life insurance on the books under group policies issued to professional associations.

Q. Can you name some of the other companies [303] that were leaders during the years at issue?

A. Mutual Life of New York had been active for years and there were a number of other companies that had specialized, Sentry Insurance Companies, for example, and, as I say Prudential had some business on the books but they had not been actively engaged in that marketplace.

Q. Mr. Moran, did you participate in the design of the original ABE life insurance program?

A. Yes, at that time I was head of our group underwriting division and my role was the determination of what schedule of amounts of insurance could be offered at a set price of \$20 per year per insured member under the original plan. It was a housekeeping matter of taking a premium rate table and turning it inside out so to speak to determine the amounts of insurance for a specific price.

Q. Whose idea was the \$20 a year premium?

A. I would say that that was collective brainstorming. I couldn't pinpoint the extent to which anyone came into that initial meeting with a preconceived idea.

* * * * *

[307] Q. Now, did the New York Life Insurance Company pay anything to the American Bar Association for bringing the Endowment account to New York Life?

A. No.

Q. Did New York Life pay Mr. Mason anything for bringing the Endowment account to it?

A. No.

* * * * *

[311] Q. I take it then that your suggestions were always to decrease rates?

A. Our suggestions and proposals and recommendations had always been in the direction of decreasing rates. But of course our posture with respect to making such recommendations was always controlled and influenced to

a large extent by our awareness of the fundamental purpose of the plan, which was the generation of dividends to the Endowment.

Q. How would you describe the Endowment's attitude toward decreases in rates?

A. During the 1960s, they were reasonably aggressive about plan improvements and pricing improvements to help build up momentum in the growth of enrollment. After the new series plans were installed in 1972, by which time the volume of insurance under the plan had gotten so big, and the experience had been so favorable that dividends had become quite large, we began to observe a general pattern of apprehension about further pricing liberalizations because liberalization of the price of insurance to the insured members might reduce the potential for dividend income to the Endowment.

Q. During the years in issue, if fund-raising had not been the goal of the Endowment would New York Life had been willing to set gross premium rates at a level substantially lower than those in effect?

A. Unquestionably.

Q. During that same period, would New York Life have been willing to enter into a group insurance contract that provided that any dividends to the policyholder would be used to reduce the cost of insurance to ABE members?

A. Yes.

Q. How does a dividend to the policyholder affect the price of insurance?

A. It reduces the price of insurance. Whether it reduces the price of insurance to the individual members who are insured under the plan depends on whether the dividend is passed through or whether there is a pass-through of portions of the dividend to those insured members.

[313] Q. During the years in issue did any of the professional association group plans underwritten by New York Life use dividends to reduce the cost of insurance to their members?

A. Yes.

Q. What percentage or what proportion did that?

A. I would say that about half of the association group plans, including a couple of the very largest, passed through the entire amount of dividends received from New York Life to reduce the cost of insurance to the members. Some of the other groups passed through a portion of the amounts received as dividends to reduce the members' insurance costs and in some instances applied a portion of what they had received as dividends to cover certain costs which they viewed as related to the management and supervision of the insurance plan itself.

Q. Did any of the professional association groups besides the Endowment retain the entire dividend?

A. Not that I know of.

Q. When the dividends were used to reduce the cost of insurance for the members of the other groups, what entity applied the monies for the benefit of the members, was it New York Life or was it the group [314] policyholder?

A. Under all of our group policies on which we paid dividends, we would disburse dividends to the group policyholder and the administrator of the plan, usually an independent organization, who would then make the calculations to determine the amounts from that dividend to be credited to the individual insureds. In at least one instance the calculations and the allocation of those credits were made by the policyholder association itself.

Q. We have talked a little bit about professional association group. What is professional association group?

A. Well, we view a professional association group as group policies under which an association of professional

people, doctors, lawyers, accountants, etc., contracts with New York Life to act as a buyer of insurance on behalf of its members.

And it in effect negotiates a deal with New York Life as to the terms on which New York Life will make certain forms of insurance available to the members of the association.

Q. Excluding for a moment the American Bar case, what is the purpose of a professional association sponsoring a plan through New York Life Insurance [315] Company?

A. In general, the primary purpose of sponsoring a life insurance plan for an association as to strengthen the relationship between the association and its members, or strengthen the bonds that tie the members' common interests together, to reinforce the existing relationship that already exists.

Making a service like insurance available to the members is viewed by associations as one way of doing that. In the American Bar Endowment case, we viewed that the opportunity to combine the fund-raising objective of the Endowment with the ready availability of insurance under an American Bar sponsored plan was an attractive feature of the program.

Q. Suppose that during the years in issue the Endowment had come to you and said, "We are going to give up our fund-raising goals with respect to our insurance plan. The American Bar Association would like to take over this plan and make it a low cost service to members program." Would you have been willing to enter into a contract with the ABA on that basis?

A. Quite eagerly.

Q. I am sorry, I didn't hear you?

[316] A. Quite eagerly.

Q. Mr. Moran, what is mutual insurance?

A. Mutual insurance is a mechanism for attempting to deliver insurance protection to a group of policyholders at cost. It relies on the contribution from the policyholders, who collaborate much in the way that a cooperative might be established, in establishing a pool of surplus contingency funds to cover losses that might be sustained; in a way that makes it unnecessary to obtain capital from outside sources. And by not relying on outside sources for capital in the form of common stock, ownership stock, the insurance company that is created is able to save one element of the cost of providing the insurance protection and deliver the insurance coverage to its policyholders at cost.

Q. When you say "at cost," what does that mean?

A. Well, the costs are the sum of the amounts paid in benefits plus the costs of administering a program, minus whatever investment income is generated by the funds held by the insurance company.

Q. What would be the relationship between the initial premium paid by a policyholder and the cost?

A. Under most mutual insurance schemes the premiums paid in by the policyholders represent, in [317] effect, a guaranteed maximum cost of insurance, and any balance that remains, the excess of those premiums over the realized actual costs of providing the insurance, are available for surplus and the management of the insurance company determines what portion of that surplus is distributable to the policyholders as a cost reduction.

Q. Is New York Life a mutual insurance company?

A. New York Life is a mutual company.

Q. And is the American Bar Endowment policy a participating policy?

A. Yes.

Q. Would you define a participating policy?

A. A participating policy is a policy which provides that the policyholder will share in the divisible surplus of the insurance company as ascertained by the insurance company and as apportioned among its policyholders.

Q. Does a mutual insurance company such as New York Life make a profit?

A. The word profit is one that is awkward to use in conversation, when you refer to a mutual company. Profits are in effect retained surplus not yet distributed as dividends, not yet distributed to policyholders?

[318] Obviously, a large thriving organization must operate in an atmosphere of expecting that its surplus funds will grow, corresponding to growth in the size of its business operations. And I would say that we internally describe growth in surplus, money received and retained, and not yet distributed to any policyholders, as profit.

Q. So you would call what would otherwise be termed profit on the group insurance contract, you would call that contribution to surplus?

A. That's correct or —

Q. Or a charge for risks and contingencies?

A. That's correct.

Q. We have some discussion today about dividends. Could you tell us what is a dividend?

A. A dividend is, in the interest of a mutual insurance company's participating group life insurance policies, is the excess of the premiums over the amount that the insurance company determines to have been the cost of providing the insurance under that policy, after deducting — I am sorry, after taking account of benefit costs, expenses and investment income.

Q. How does New York Life go about determining the dividends on the American Bar case or any other [319] group case?

A. Each year the management of the group insurance operation develops scales of dividends for use in the following year. These scales include formulas and factors for computing various quantities. The dividend scales are submitted to New York Life's Board of Directors for approval. Upon approval by the board, the group depart-

ment then subsequently makes the dividend determination for each insurance risk by applying the factors and formulae in the scale to the specific data for each group insurance policy.

Q. Mr. Moran, is there a basic formula for calculating the dividend that you could put on the blackboard for us?

A. An over-simplified version of it, I do.

(Witness writes on the blackboard)

The dividend equals premiums plus investment income —

Q. When you say premium you mean gross premium?

A. That would be the gross premium income received. Investment income comes from the cash that is in your hands that hasn't yet been paid out as benefits or for any other purpose. Benefit costs, that is essentially claim payments that we have made plus the costs of maintaining reserves for liabilities [320] that haven't yet been paid out. That would include reserves for situations where a member has died and we don't know about it yet or a member has died and we know about it but the benefit hasn't been paid out yet because of paperwork still in progress, and it could also involve things like unreported disabilities where upon discovering that the individual has been disabled, we'll have an obligation to continue his coverage indefinitely without further premium payments, the so-called waiver of premium reserves.

One other item in benefit costs would be the cost of conversions to individual policies on termination of insurance. The group insurance companies customarily have to reimburse their individual insurance operations every time there is a conversion of insurance on termination of membership

Q. That conversion would be required by state law?

A. The conversion is required by state law, yes. Expenses would include our own operating expenses for what our own people do. It would include what we pay others for handling various sales and administrative functions.

It certainly includes the commissions that we pay to a broker. It also includes premium tax charges. And it includes, particularly with [321] reference to the Endowment's plan, federal income tax costs.

Risk charge. We have referred to that earlier, that is the contribution to surplus; the modest amount that we consider as New York Life's current profit that is added to our surplus to help strengthen our ability to assume more insurance risks in the future.

The last item, allocation to special reserve, relates to the fact that under certain plans, where the spread between premiums and expected costs is not large, there is reason to establish certain special contingency reserves that can represent an additional cushion to rely on to absorb fluctuations in the cost of insurance. And so we have a generalized provision for building up special contingency reserves on group policies and this allocation can be either a charge against current year premium or it can be a negative item if we release some amounts that we have previously held in special contingency reserves.

Q. With respect to the Endowment case do you have any special contingency reserves?

A. We do not now have any with respect to the American Bar Endowment life insurance plan.

Q. Was that also true in the years at issue?

[322] A. That was true for this entire period at issue.

Q. With respect to the Endowment we can simply erase that last factor in the formula?

A. That's correct.

Q. Now, with respect to the 3 remaining factors, what would be the largest factor in determining the Endowment's dividend?

A. Well, of the deducted items it would be benefit costs. Benefit costs for a group, for an association group life plan, are typically anywhere in the neighborhood of 50 percent of premium or larger. There are a few instances where they run smaller.

Q. Would the Endowment be able to control those benefit costs?

A. Not unless they are clairvoyant or extremely selective in their membership or in their mailing and solicitation literature.

Q. Mr. Moran, directing your attention to the years at issue, did the dividend paid to the American Bar Endowment by New York Life include any payment for sponsorship of the group life insurance program?

A. No.

Q. Did it include any payment for endorsement of the group life insurance program?

[323] A. No.

Q. Did it include any payment for bringing the group to New York Life?

A. No.

Q. Did it include any payment for services as a market maker?

A. No.

Q. Did it include any payment for services as a broker?

A. No.

Q. Did it include any payment for services as an insurance agent?

A. No.

Q. Did it include any payment for any assumption of any underwriting risk?

A. No.

Q. Did it include any payment for any services at all?

A. No.

Q. Did it include any payment of an entrepreneurial profit or fee?

A. No.

Q. During the years in issue did the Endowment provide New York Life with its own mailing list or with the American Bar Associations mailing list?

[324] A. No.

Q. Yesterday the Court asked Mr. Gregory what a group policyholder was. Could you define a group policyholder for the Court?

A. I would define a group policyholder as an organization, or in some instances an individual, who contracts with an insurance company's for the insurance company to provide insurance on the lives of a group of individuals who are represented by the policyholder in their negotiation of the terms of this insurance arrangement.

Q. With respect to the professional association group policyholders that you have at New York Life, what are their responsibilities in relationship with New York Life?

A. Well, they all certainly have the responsibilities for overseeing or in some instances dealing directly in negotiations with New York Life over the terms of the group program, including coverages to be provided, premium rates to be charged, administrative arrangements to be established, the services that they expect New York Life to provide as part of the operation of the plan, the designation of the broker, and whether that broker will assume certain sales responsibilities, the designation, [325] perhaps, of an administrator to perform administrative responsibilities.

Q. During the years in issue did New York Life compensate any of its group policyholders for performing any functions?

A. No.

Q. You made reference a minute ago to an administrator. Could you define that, please?

A. Well, there are a number of administrative functions that have to be handled by somebody in connection with the operation of group insurance plan.

These, in many respects, are the counterparts of administrative functions that an employer handles under a traditional employer/employee group insurance plan,

such as tallying up the records as to who is insured under the policy, and keeping a record of who is insured, what kind of insurance they have, getting premiums remitted to the insurance company, and so forth.

Q. Would those functions include enrolling eligible people in the plan?

A. They frequently do include the enrollment of the people who are eligible for the insurance, yes, in an employer group plan that is traditionally the case. In an association group plan that may be handled by [326] the administrator or by the broker or by the association.

Q. We diverted from what an administrator was. What is an administrator?

A. There are functions that have to be performed. Some associations are not equipped to perform those functions themselves. Others might be equipped and capable of doing so, but for one reason or another prefer that the administrative functions be handled either by the insurance company itself or by an independent organization, acting on behalf of the insurance company, subject to selection by the association.

A. There are a number of firms acting in the business as broker administrators, specialists. In some instances they are performing services on behalf of the association, and on behalf of insurers in connection with insurance programs. In some instances supplemented by other activities performed on behalf of association clients. The organization that acts as an administrator is usually also a brokerage organization, or at least another corporate arm of an organization that has a brokerage operation.

But it may be an independent operation or it may be, in some instances, part of the insurance [327] company. New York Life acts in effect as administrator on some types of group insurance.

Q. Now, if there is an administrator involved in a New York Life professional association group case, who compensates that administrator?

A. New York Life.

Q. Suppose there is no administrator, and the administration functions are done by the policyholder, is the policyholder compensated by New York Life?

A. No.

Q. Does the Endowment have an administrator?

A. The Endowment does its own administrative work with respect to the New York Life group policy.

Q. During the years in issue did New York Life have any other groups that did their own administration?

A. Only one professional association group handled the full array of administrative functions comparable to what the American Bar Endowment did, and that was a Canadian group, the Ontario Medical Association.

Q. Did that group return the dividends it received to its members?

A. I believe it returned to members an amount that actually exceeded what they had received from New [328] York Life in dividends because they had an arrangement under which certain funds that had been paid in by members were held by the association and earning interest so that the amount available at the end of the year included not just the New York Life dividend.

But they did pass it all back to the members.

Q. During the years in issue was the Endowment authorized to issue certificates of coverage to members who enrolled in the life program?

A. Yes, technically from a legal sense I think New York Life issues,—they were authorized to prepare and distribute certificates describing the insurance under the New York Life group policy.

Q. Were these certificates cleared in advance with New York Life Insurance Company?

A. Oh, the content of the certificates was very definitely determined by New York Life and filed with the regulatory authorities.

* * * * *

[338] A. This is a very familiar document because I prepared it myself and this is what appears to be the final text of the report that I prepared in October, 1980 to the chairman of the Insurance Committee of the American Bar Endowment at his request.

Q. What was the purpose of the report?

A. The purpose of the report was to review the claim experience and the competitive situation as they related to the American Bar Endowment's Life insurance plans in the Summer of 1980.

Q. What was the reason for the review?

A. The reason for making the review was that I attended the Insurance Committee meeting of the American Bar Endowment in June, 1980 and the Insurance Committee chairman asked me a question, "What is happening in the competitive area with respect to our life insurance plan?" And I answered with several comments that the competitive marketplace was changing dramatically, not just with reference to availability and price of group life insurance plans that might be alternatives to the American Bar Endowment, but most dramatically with respect to the prices of individual term life insurance.* * *

* * * * *

[343] BY MS. CARPENTER:

Q. The premium on the black board you are showing us?

A. Yes. The second line, "interest credits before federal income tax charges," that is New York Life's statement of the investment income apportionable in this contract based on New York Life's investment experience.

Q. So in this particular year marked "current year" the first the item in the formula there, "premium plus investment income" would add up to 106 percent of premium?

A. That's correct. "Benefit costs," the amount showed is incurred claims in the exhibit.

Q. So the 36 percent there would include actual claims plus any reserves for pending claims, etc.?

A. That's correct.

Now, items 3, 4 and 5—I am sorry, items 4, 5 and 6 together make up "expenses," in other words, commissions paid, item 5, the charges for premium [344] taxes, charges for federal income taxes and charges for New York Life's own expenses add up to the expenses item.

Q. Let's go back to item 4. What's commission, referred to here?

A. Those are the commissions paid to Fred S. James & Company, or James Group Services, the organization that is designated as broker by the ABE and which has responsibility specifically for consultative and advisory services with respect to this plan. They do not have the responsibility for enrollment solicitation activity.

Q. Am I to understand that New York Life pays James Group Service, and then New York Life turns around and charges the Endowment against its dividend for whatever payment is made for James Group?

A. That's correct.

Q. And then could you explain the premium taxes and federal income tax charges?

A. The premium taxes are basically determined by applying the various premium tax rates in the specific states to the distribution of enrollment of members under this group policy by state. Each state's share of the total premium received by New York Life on the Endowment group policy is added to [345] the premium income recorded for that state by our controllers department for purposes of determining the premium taxes payable to the state. And likewise, we get tax credits from some of those states with respect to the dividends paid to the Endowment, and those credits are also passed back through to enhance the dividends.

Q. So the premium taxes and federal income tax charges shown are payments made by New York Life that are then charged against the Endowment's dividend?

A. Yes, it's the Endowment's formulated share of what we have determined to be the total taxes assessed against our group insurance operations.

Q. What makes up the expense charges that are listed in line 6?

A. Well, on the Endowment's plan there are charges for several types of activities that New York Life performs on this case. One is the cost of administering claim payments for claims incurred on this plan. The claims on this case are handled by New York Life claim offices, primarily our claim office in Chicago, but also our home office claims organization and they handle the processing and disbursement of benefits and all the life insurance claims on the case.

* * * * *

[352] Q. Now, how does that number, 10,000 members in New York State, compare with the number of members enrolled in the Endowment group life program?

A. The enrollment in the Endowment group life program has been dropping to the point where I believe it has now fallen below 50,000. It was between 40 and 50,000 for the years in issue that you referred to earlier.

Q. In how many states was the Endowment plan available during the years in issue?

A. The Endowment plan was generally available in all states during the years at issue although there were some restrictions on availability in Texas during part of that time. I don't know that the plan was available in Texas throughout the period.

* * * * *

[355] Q. Mr. Moran, with respect to Exhibit 297, may I direct your attention to Exhibit Roman III. And specifically direct your attention to the middle of the page where it says "breakdown of balance." And there is an Item 7-A, "charges for compensation." Could you explain what those charges are?

A. Well, there are two categories of charges for compensation because we pay compensation in two parts to the Bertholon-Rowland, that is a prominent brokerage firm in New York City, which is the broker designated by the New York State Bar Association with respect to this plan and also acts as administrator to perform certain administrative functions on the plan. The figures shown in Exhibit 3, on items 7A-1 and 2, are the respective amounts of commissions payable to Bertholon-Rowland in its capacity as broker and the service allowances payable to Bertholon-Rowland in its capacity as an administrator.

Q. What would those payments represent, what services would be performed for those payments?

A. Well, commissions are payable with respect to ongoing sales activity. The Bertholon-Rowland organization conducts the continuing enrollment solicitation among members of the New York State Bar Association for participation in the plan and some of [356] it by mail, some of it involving personal contact. And they handle all of the promotional and sales activity, including putting out sales promotional literature; designing literature that is used for solicitation activity in the case. And they get compensated through commissions on the business produced as well as renewal commissions on the premium payable for old business.

The administrative allowance is payable with respect to their services in connection with processing premium remittances from insured members. And that also includes the mailing of premium billings to the insured members. And the distribution of the dividend credits to insured members as credits on premium bills.

Q. I take it then that Bertholon-Rowland acts both as a broker and an administrator on this plan?

A. That's correct.

Q. And am I reading Exhibit 3 correctly to say that the total compensation for both brokerage activity and administration for this particular year was 9.1 percent of premium?

A. That's correct.

Q. I direct your attention to Exhibit 298, also [357] Exhibit Roman III on 298, and ask you to point out to us where the compensation to Bertholon-Rowland is reflected on Exhibit 3.

A. Well, again, we have a rearrangement of the sequence of presentation but in the breakdown of balance, item B, Subitems 1 and 2 are the respective counterparts for the policy year ending in 1980 of the amounts shown in the earlier exhibit for the preceding policy year.

Q. So that reflects the 9.1 percent we just discussed plus 10.5 percent for the year '79, 80?

A. That's correct. Now, I have to comment that that 10.5 percent figure includes some amounts referred to in footnotes on that exhibit; some of which were amounts that were paid as adjustments of amounts calculated in previous years.

Q. In the retrospective adjustments of amounts that had been determined for previous years that were incomplete? Those are the two footnotes indicated there?

A. That's correct.

Q. Are the dividends for the New York State Bar for these two years reflected on this page?

A. Yes. The dividend is shown as line 5 and this is the aggregate of the amounts paid as dividends [358] to the individual policyholders.

Q. That was 43.5 percent for '78, '79 and the 39.7 percent for '79, 80?

A. That's correct.

Q. Directing your attention to Exhibit 299, would you point out that same information for us, please, the payment to Bertholon-Rowland and the dividend.

A. All right, Exhibit 3, under the breakdown of balance, Item B, Subitems 1 and 2, and the figure for the policy year ending in 1981, commissions is \$452,000, administrative allowances, \$116,000, and for some reason there is one less decimal place in the percentage figures shown in this exhibit than there had been in the others but it is clear that the amount is in the neighborhood of 9 percent of premium for combined commissions and administration allowances.

Q. And the dividend?

A. And the dividend was \$2,792,000, 44 percent of premium.

Q. Approximately how did the gross premium rates on the New York State Bar plan compare with the Endowment plan during the years in issue?

A. In general, the gross premium rates are somewhat comparable but there are some situations [359] where they are higher than the American Bar plan and others where they are lower. The situation or the subject is addressed in the Exhibit 627 report, Exhibit Roman X-A near the end of the report, which contains some comparisons, and those comparisons show, for example, that there are some situations where the premiums charged to members for the New York Bar plan were lower than the American Bar plan premiums. A case in point would be at age 40 for an individual with \$100,000 of insurance, where the premium charged for the American Bar plan was \$500, the premium charged for the New York State Bar plan was \$448. For the policy year ending in 1980. And then effective in December, 1980 for the new policy year that premium rate was cut to \$408. So the gross cost, the gross premium cost of the American Bar plan was higher than the gross premium cost of the New York Bar plan at that time.

Q. Mr. Moran, next I want to show you what has been marked as Exhibit 301 and as Exhibit 1201-A, and ask you to identify them.

A. Exhibit 301 is a copy of the financial experience report to the broker administrator with respect to the experience on the group life plan for the members of the Institute of Electrical and [360] Electronics Engineers, commonly referred to as the I triple E.

Q. How big a group is the I triple EEE?

A. The insured group contains some 30 to 40,000 members, I believe.

Q. 30 to 40,000 insured lives in the group?

A. Insured lives.

Q. What's the practice of this group with respect to dividends?

A. New York Life disburses the dividend to the trustee of the IEEE insurance trust, which holds it pending instructions from the administrator for distribution or for distribution for disposition. Let me withdraw that comment. I can make it a simpler description if I start over.

When New York Life completes the determination of the amount of the dividend, we notify the trustee and the administrator of the amount of the dividend that is being determined. They respond "hold the money as an advanced premium deposit pending instructions. At some point we'll tell you what to do with it." They then calculate the amount that is to be distributed as a credit to the individual insured members of the IEEE at the next semiannual billing date. The policy anniversary is September 1. The [361] next semiannual billing date is March 1. When the administrator prepares the billing notices to the IEEE members for the remittances due on March 1, they reflect a credit for the allocated share of the dividends on the case, usually determined as a percentage of the premiums for the preceding policy year.

In some instances, the credit may be equal to the entire amount payable by the insured member, so that the member receives a notice that nothing is due, the dividend is distributed as a complete offset to the premium contribution required.

Q. How would the net cost during the years in issue of the members of the IEEE group compare with the costs to Endowment members of the same amount of coverage?

A. Very favorably.

Q. Favorably with respect to whom?

A. It's very favorable to the people insured under the IEEE plan.

Q. And why is that?

A. Dividends have been consistently high, in the neighborhood of 40 to 50 percent, and I believe they have exceeded 50 percent at least once if not more. Premium rates have been roughly comparable. [362] The premium rates have been reduced two or three times since the early 1970s, so that the gross costs to the member compare favorably with the American Bar plan and with dividends in the 40 to 50 percent plan, the net costs compare even more favorably.

Q. Do Exhibits 301 and 1201-A reflect the dividends for the years in issue?

A. Yes.

Q. What were they?

A. For the policy year ending August 31, 1979, the dividend was 56.6 percent of premiums for that policy year, and for the policy year ending August 31, 1981, the dividend was 52.3 percent. Exhibit 1201-A also shows the figures for the intervening year ending in 1980, where the dividend was 53.7 percent.

Q. Let me direct your attention to the second page of each of these two exhibits and ask you whether they reflect the compensation to Smith Sternau for their work in this program?

A. Yes.

Q. Let's just by way of example look at Exhibit 301. Would you explain what the compensation to Smith Sternau consists of and what work was done by Smith Sternau to earn that compensation?

A. With respect to commissions, in its role as [363] a broker, Smith Sternau had full responsibility for the ongoing promotion and enrollment solicitation of the program, publicity, mailings to individual members, encouraging existing insured members to upgrade their coverage, participation in meetings with the IEEE organization to some extent. It was a sales function. And those commissions of \$578,000 represented the sum of first year commissions at the rate of 15 percent on first year premium for new coverage, renewal premiums at 5 percent on the remainder of the premium. The service allowance shown is for performing all of the underwriting processing, certificate issue processing, maintenance of enrollment records, premium notice mailings to insured members, processing of contributions received from members toward their premiums, handling all general service work with the insured members, including transmittal of notices back and forth, communications with New York Life to provide us the data we needed for actuarial purposes, etc.

The compensation payable to Smith Sternau for performing those services for this policy year ending in 1979 was \$12 per year per insured member, which worked out to \$435,000, and obviously that indicates there were about 36,000 members insured [364] during that year. The compensation represented 4.3 percent of premium for administrative services.

Q. Thank you.

MS. CARPENTER: At this time I offer Exhibits 301 and 1201-A in evidence.

MR. MARKHAM: No objection, Your Honor.

THE COURT: Admitted.

(The documents referred to, previously marked Plaintiff's Exhibit Nos. 301 & 1201-A for identification, were received into evidence.)

MS. CARPENTER: And I also move the admission of Exhibits 297, 298 and 299.

THE COURT: Are those stipulated as well?

MR. MARKHAM: No objection, Your Honor.

THE COURT: Okay, 297, 298, 299, 301 and 1201-A are admitted without objection.

(The documents referred to, previously marked Plaintiff's Exhibit Nos. 297 through 299 for identification, were received into evidence.)

BY MS. CARPENTER:

Q. Mr. Moran, next I am going to hand you Exhibits marked 309 and 302.

Can you identify Exhibit 309?

[365] A. Exhibit 309 is a copy of a worksheet prepared by one of the people in New York Life's Association group division to recapitulate the basis on which the factors were to be determined for computation of the service fees payable to the Smith Sternau organization as administrator of the group insurance program sponsored by the trustees of the Engineering Association's Insurance Trust for the policy year 1978 and '79.

Q. Can you identify Exhibit 302?

A. Exhibit 302 is the counterpart worksheet used to determine the service compensation to Smith Sternau on the same EAIT group life plan for the policy year beginning October 1, 1980.

Q. Were forms similar to this used to calculate the compensation that we just discussed on the IEEE plan?

A. I won't say they were used to calculate the compensation. They were used to document and record the determination of which factors in the array of factors in our compensation scale were applicable to a particular case for a particular policy year.

Q. You should forgive my imprecise question, was a sheet like this one filled out for IEEE?

A. Yes.

[366] Q. And I see a number of figures circled here, how is it determined which one of these figures to circle?

A. An individual familiar with the operation of the administrative functions on each case notes which of the functions are actually currently being performed by the administrator with respect to each plan; and he checks off those that are and adds up the factors that pertain to those functions that the administrator is performing. The amount of compensation that will be payable is the lesser of the amount determined by applying the dollars per insured member factor or the percentage of premium factor.

Q. How does the percentage of premium factor come in? I note it says maximum percentage of premium.

A. What that means is that even if our scale calls for payment of \$14 per year per member for coverage under a particular plan, we still will override that scale provision if necessary to keep the compensation that is payable from exceeding 12 and 1/2 percent of premium.

Q. Did the compensation payable during years in issue typically reach the maximum percentage of premium on your professional association group cases?

[367] A. It did not come close to the maximum on any of our professional association group life plans.

Q. Was this the standard scale used to calculate compensation for administrators of professional association groups during the years in issue, as referring to Exhibits 309 and 302?

A. The factors shown on these two exhibits are the mainstream factors applicable generally. There were certain situations where the functions were performed by an administrator on some kind of a modified basis, which called for the regular factors to be overridden in a fashion that generally would have produced reduced

compensation, taking into account some functional activities that were saved by the methods used in a particular case

Q. Mr. Moran, did you, at my request, calculate what the Endowment would have been paid had it been a third party administrator on its plan during the years in issue?

A. Yes.

Q. And could you give me those figures for 1978, 1979?

A. I left them in my briefcase.

Q. Could you excuse us one moment, Your Honor?

A. For the policy year ending in 1979 the [368] compensation payable on the same scale that was illustrated on the worksheet that has been introduced as Exhibit 309 would have been \$466,792, representing 6.46 percent of premium for that policy year on the American Bar Endowment case.

For the policy year ending in 1980, compensation would have been \$460,556, representing 6.04 percent of premium.

On the revised scale of factors applicable to the 1981 — the policy year ending in 1981 for the Engineering Association case was illustrated on the worksheet introduced as Exhibit 302, the compensation hypothetically payable on the American Bar Endowment case would have been \$519,192, 6.63 percent of the premium.

Q. Mr. Moran, suppose that during the years in issue the American Bar Endowment had come to you and said, "We have found a third party administrator who will administer our plan for less than the standard factors used by New York Life." Would you have entered into an association with that third party administrator to administer the American Bar plan?

A. We would not have let the fact that they were interested in performing services for less than our normal standard scale have prevented us from [369] working out an arrangement to do business with them. There were certain technical requirements prescribed by New York insurance law that would have to be dealt with in order to arrange for determining the compensation on a mutually acceptable basis, but we had experience of having worked out arrangements to do so in other situations, so we would have been willing to deal with them, subject of course to a determination that they be able to provide adequate service to our satisfaction and confirming that their interest in doing so was acceptable to the American Bar Endowment.

MS. CARPENTER: Your Honor, I move the admission of Exhibits 302 and 309.

MR. MARKHAM: No objection, Your Honor.

THE COURT: They are admitted.

(The documents referred to, previously marked Plaintiff's Exhibit Nos. 302 & 309 for identification, were received into evidence.)

MS. CARPENTER: Thank you, Your Honor.

* * * * *

[380] JOSEPH MORAN
having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MS. CARPENTER:

Q. Mr. Moran, yesterday you mentioned that you first became involved in the American Bar Endowment case in 1953. Were you involved in the case continuously after that?

A. To one degree or another, almost continuously.

Q. Until 1981?

A. Up until May of 1981.

Q. Back in the 1950's when the Endowment entered into the group contract with New York Life, was the Endowment paid anything for entering into the contract or providing the group?

A. No.

Q. During the years in issue, approximately how many professional association groups were insured by New York Life?

[381] A. New York Life insured about 50 professional associations. A large number of those associations were under a multiple association trustee plan that we discussed yesterday. We had actually about 15 separate cases for the purposes of managing our business.

Q. How much professional association life insurance was in force during the years in issue?

A. During the neighborhood of \$10 Billion face amount of life insurance.

Q. Has the ABE group life plan always contained a large margin of dividends?

A. Yes.

Q. Would that margin have been lower if fund raising had not been the goal of the endowment?

A. Very likely, yes.

Q. Yesterday we were talking about the dividend formula and I asked you what was the largest element in the ABE's dividend formula and you said that as to deductions, claims were the largest element, is that correct?

A. That's correct. The largest numbers that get into the dividend calculations are, of course, the premium numbers, which are the main additive item. The other items are subtracted from premiums and the dividend is a remainder of premiums.

[382] Q. And yesterday we also talked about the New York State Bar Plan?

A. That's right.

Q. How much insurance was available to members of the New York State Bar Association during the years in issue?

A. During this period I believe the maximum amount of insurance was about \$250,000.

Q. Now, switching gears for a minute, in the American Bar Endowment Plan, do you know how many lawyers with billing addresses in New York State who were enrolled in the American Bar Endowment plan during the years in issue?

A. According to the information supplied by the Endowment for use in our calculation of premium taxes, the New York lawyers accounted for about 8.8 percent of the business in force on the American Bar case for a period in which the enrollment was in the neighborhood of 44,000 members on the Endowment's plan. That would mean that there were just under 4,000 New York people insured on the Endowment plan.

Q. What state had the largest enrollment in the Endowment Plan?

A. New York.

Q. Is New York Life or was New York Life during the years in issue contractually obligated to pay the Endowment a dividend?

* * * * *

[387] Q. Mr. Moran, I'm going to show you an exhibit that's been marked as Exhibit 1173. Can you identify this document?

A. This is a copy of New York Life's report to the insurance committee of the American Optometric [sic] Association on the financial experience for the policy year ending November 30th, 1980, on the group life insurance plan sponsored by the AOA as group policyholder.

Q. Now, at this time was there an administrator on the AOA plan?

A. Not at this time.

Q. Were any payments made to the AOA for administration?

A. Not by New York Life.

Q. Was there a broker or an agent?

A. Yes, during this policy year there were three different brokers involved. The original broker who had been designated by the AOA when the group policy was originally issued in 1956 had remained designated to receive renewal commissions with respect to a portion of the premium on the case.

And then in 1977 the AOA had arranged for designation of a brokerage firm to assume responsibility for ongoing solicitation and promotion of the plan and that broker was entitled to receive commissions on first year premium for new [388] business generated after that date, and also to receive renewal commissions to the extent that there was growth in the amount of renewal premium on the case above the level that had been in force at the time the new broker was designated.

Unfortunately that broker early in 1980 became unable to continue in the role of broker and during 1980 there was another brokerage firm selected as its successor and that new brokerage firm was entitled to commissions with respect to new business generated beginning August 1, 1980.

Q. Now, are the commissions for all of these brokers reflected in Exhibit 1173?

A. The commission figures shown in this exhibit represent—

Q. Mr. Moran, do you want to direct our attention to where you are?

A. I'm on Exhibit 3.

Q. Which is the fourth page of this document?

A. The fourth page of this exhibit. And, the figures shown for the current year as commissions because of some of the unusual circumstances that prevailed at the time represent the amount which would have payable for this policy year if there had not been a change in the brokerage arrangements during the year.

Q. That would be the 3.1 percent figure?

A. The 3.1 percent factor represents what would have [389] been paid. We actually paid somewhat less than that because of the hiatus between the termination of one broker's activity and the assumption of responsibilities by the new broker.

MS. CARPENTER: Your Honor, I move the admission of Exhibit 1173 into evidence.

MR. MARKHAM: No objection, your Honor.

THE COURT: It's admitted.

(Plaintiff's Exhibit 1173 was received into evidence and made a part of the record thereof.)

BY MS. CARPENTER:

Q. Mr. Moran, with respect to the Ontario Medical Association, which we discussed yesterday, how large a group is that?

A. During the years of issue, there were some 8,000 members insured for a total amount of insurance somewhat in excess of a billion dollars.

Q. And I think you told us yesterday that that's a self-administered plan?

A. Yes.

Q. And that the organization returns more than the dividend back to its members?

A. That's correct.

* * * * *

[395] [Moran—Cross] A. We assess charges for underwriting, which vary according to whether we do the entire review of the application papers or whether there is

a preliminary screening performed by some other organization. With respect to general service to insured members, preparation and transmittal of communications to members, mailing notices to members, handling correspondence for members with respect to changes in beneficiary designation, name changes.

There there's again a distinction between the charges that are assessed if New York Life performs those services versus the charges that apply if somebody else performs those services.

Maintenance of individual enrollment records with respect to the insured members, the charges are higher if we do that ourselves than they are if somebody else is doing it under our supervision. The collection of remittances from insured individuals to be applied toward payment of premiums by the association, again there is a charge that is larger for that collection function if it is performed by New York Life than if it's performed by another organization.

All of those are costs which would have been higher—for which the expense charges would have been higher if New York Life had been providing the services directly.

Q. And in other words, if New York Life or an independent broker-administrator had performed all of the services [396] and functions you just mentioned, which were undertaken by the endowment staff, item six would have been substantially higher and the dividend balance would have been substantially lower?

A. Well, the expense charge would have been substantially higher. The depletion of the dividend which would have resulted, would have been substantial in dollars for a relatively small percentage of the amount of the dividend.

I think I quoted yesterday a figure of about—somewhere between four and five hundred thousand dollars as the amount that we would have paid an independent

broker-administrator for performing an array of administrative functions. And had we done so, the depletion of the dividend that would have resulted would have been only about one-ninth of the dividend. In other words, of that \$4,278,000 of refund for this policy year, which was dividend plus a couple months' interest on the dividend, almost 90 percent of it would still have been payable even if New York Life had been using an outside administrator to provide the services that the American Bar Endowment provided itself.

Q. And I believe that on direct examination you testified that New York Life did not pay compensation to the Endowment for performance of services. Isn't it true, however, that New York Life paid a dividend to the Endowment, which was, in fact, enhanced or larger, by reason of the [397] fact that the Endowment was performing those services, rather than someone else?

A. I think you're looking at it in reverse. As we perceive it, you start with the normal presumption that a group policyholder is free to perform certain functions as a policyholder on its own behalf, do the functions itself, in which case New York Life's charges for supervision of the performance of those functions is at the minimal level that's illustrated in this exhibit.

On the other hand, we make available to group policyholders, and it's not just professional association groups, there are a number of other policyholders for whom New York Life performs extra services above the minimum level and where we provide extra services to a policyholder, we assess extra charges in the calculation of dividends to recognize the extra expenses that we incur for providing those services, whether we do them ourselves or whether we engage somebody else to do them and pay that third party for performing the services.

When that happens, the expense charges are increased and the dividend is depleted. So, in the context of your question, a dividend margin for refund of \$4,200,000. would have been depleted by somewhere in the neighborhood of \$400,000 or \$500,000 if the Endowment had requested that New [398] York Life arrange for providing those services through an independent administrator.

Q. How many other professional association groups did New York Life underwrite during this period in dispute, 1978 through '81?

A. We had about 15 professional association group life cases.

Q. Which, if any of these other groups performed the same scope of administrative services which the Endowment performed?

A. In general, the Ontario Medical Association performed substantially the same services on its plan that the American Bar Endowment performed on its own behalf on its plan.

With some exceptions, the American Optometric Association also performed administrative services on its own behalf, comparable to those performed by the American Bar Endowment.

Q. In Item four on this exhibit, Exhibit 5 through Exhibit 1109,—excuse me, Item seven, contribution to surplus, how is that computed? In other words, how is the 1.1 percent and .08 percent determined?

A. Well, the percentage that shows up in the exhibit is just the ratio of the dollar amount to the premium.

* * * * *

[401] [Moran-Cross] Q. In constructing group term life insurance rates, must an actuary also make assumptions about the expected mortality of members of the group?

A. Usually is required to make projections of expected mortality as distinct from assumptions. You can make a variety of assumptions and among those you probably will have to select something to be used as a projection or prediction.

Q. How would a group of attorneys be characterized or rated from a mortality standpoint?

A. Well, in an instance like this group, the American Bar Endowment, we would be relying primarily on our actual experience with respect to mortality and morbidity, in the group that we already insured as a primary reference point in projecting future mortality experience.

If we were developing a premium rate for a brand new group insurance risk for which we did not have a counterpart of such actual experience, we would start with a standard reference mortality table and apply adjustments on experience available from other sources that indicated the extent to which lawyer mortality differed from other types of active working groups.

Q. In general, how would you expect lawyer mortality to differ from that of the general working population?

[402] A. I think in general, we would say all other things being equal, the mortality on lawyers might be some 20 percent or so lower than the general mortality on the employed population as a whole.

Our actual mortality experience on our American Bar Plan and the New York Bar Plan show that if we look at the mortality experience on lives that have been underwritten for medical acceptability, we are able to achieve significantly lower mortality, just as we are for any other group that we underwrite on a basis of underwriting selection.

Q. What were the medical underwriting requirements for the Endowment plans during the period 1972 to June 1st, 1981?

A. Well, in general, members were required to submit a brief statement of health that included about half a dozen questions, designed to elicit information likely, — of a nature that was most likely to indicate the presence of a significant condition that would indicate significant substandard mortality.

As an exception to the general rule, for enrollments in plan A of the American Bar Endowment Program, there were general liberalizations that said members below age 40 can enroll for plan A without submitting any evidence of insurability.

* * * * *

[433] [Moran—Cross] A. I don't recall a specific written document that addressed that question as you have done so. There are references in the report that was admitted as Exhibit 627 to the fact that the potential for a charitable contribution deduction with respect to a portion of the amount paid by an ABE member for insurance under the plan clouds and fuzzys up the question of a head-to-head comparison of net costs under this plan, which are the gross outlays, with the counterpart net cost under any other plan.

I also had made oral statements at one, and I don't know which, of the three American Bar Endowment Insurance committee meetings that I attended along the lines that the whole American Bar Endowment plan was designed with the concept that the members would pay something more for their insurance than what they would get it for at the lowest [434] available net cost, and that there had to be a limit in the mind of the American Bar Endowment member as to what he could tolerate, or what he was willing to go along with in the interest of organizational support as to the magnitude of that extra payment that he made.

We were dealing in an environment where the total outlays for life insurance were getting to be much larger than they ever had been before. And a fifty percent excess cost on a thousand dollar premium was a lot more significant in the mind of an Endowment member than a fifty percent excess cost in the mind of an Endowment member who was only paying fifty dollars a year for insurance coverage.

And that the growing gap between the cost of insurance under this plan and the cost of insurance under other plans, and the fact that it was a larger percentage of a larger dollar amount was going to give them problems, and was going to give them increasingly greater problems with the passage of time.

I don't know which meeting I expressed that idea at. I attended three meetings of the insurance committee.

THE COURT: Unless you have an immediate follow-up to that I would like to call lunch right now.

MR. MARKHAM: Just one, Your Honor.

* * * * *

[480] [Moran—Cross] A. And the rationale in 1980 was that the competitive environment was changing so rapidly that the likelihood of maintaining enrollment growth patterns and persistency patterns without a response to that competitive environment was such that you would sustain some deterioration in persistency and deterioration in new enrollments if there was no change in the pricing.

And for illustrative purposes we assumed that the changes being recommended would be sufficient to restore the persistency and new enrollment pattern that had previously been projected on the basis of prior experience.

Q. Was the recommended rate revision graded in such a manner that the largest percentage of—or an increasingly large percentage reduction was applied to those enrollees in—excuse me, the older age brackets, and for the higher amount of insurance plans under the ABE series of life insurance plans?

A. The reductions in premium rates for each plan were uniform in all age brackets. But as compared from plan to plan the reductions were relatively highest for the richest plans and graded off to no change in rates for the basic Plan A.

The purpose of structuring the reduction in this fashion was to respond to the pattern of the competitive [481] marketplace under which other companies in their individual term insurance marketing were offering scales of premium rates that decreased even more sharply than we felt appropriate for the American Bar Endowment plan.

Again, looking back at the pattern illustrated in Exhibit 8 or Exhibit 10, the difference in price for a forty-year-old individual between the man who buys \$50,000 of life insurance and the man who buys—

Q. Excuse me. Which exhibit are you referring to now?

A. Exhibit 10. In the age forty column in Exhibit 10, the top half of the table, the man age forty buying \$50,000 of life insurance pays a premium that's some forty-four percent higher than the individual who buys \$200,000 as a preferred risk.

That spread is so great that we saw no way of matching it in a plan like the American Bar Endowment plan where we are not differentiating between preferred risks and standard risks and moderately substandard risks. All acceptable lives are charged the same premiums. In that context there's no way that we could have that steep a

gradation of premiums from plan to plan, but we did feel that we had to respond at least in part to the competitive market pattern.

* * * * *

[494] [Moran—Cross] A. So, in effect we have the same spread between expected claim costs and the identified premium rates segment for the AD&D portion that we have for the remainder of the case. It's roughly proportionate.

Q. I would like to place your last answer within the context of Exhibit 627 on—do you still have a copy of that? On Exhibit 10-A on page 0079 of that exhibit?

I think the exhibit indicates, and you previously testified that the New York State Bar Association plan did not have AD&D but the Endowment's plan does have such benefit.

Based on the figures you just testified to, what would the cost change be on the bottom line of the Endowment's block of data, their cost per thousand attributable to the AD&D benefit? I think these are semi-annual rates.

A. Well, if we want to go back to the column age forty to forty-four that I have used in previous comments, the bottom line figure in the New York State Bar block is an annual net cost to the insured of \$2.24 per thousand.

I estimate that that figure would rise to about \$2.50 per thousand if the plan were liberalized to include accidental death benefit coverage, and if the experience on that accidental death benefit coverage were comparable to [495] what is it on the American Bar Plan.

The gross premiums would probably go up by about \$40—somewhere between 40 and \$50 per year for a \$100,000 of accidental death benefit coverage. Claim costs would be somewhere between \$25 and \$30 per year per \$100,000.

It still would be a very substantial gap between that the cost and the cost on the American Bar plan.

* * * * *

[572] EDWIN P. BROOKS
was called as a witness by counsel for Plaintiff and, having been duly sworn by the Trial Judge, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. CARPENTER:

Q. Mr. Brooks, would you state your full name and address for the record, please?

A. Edwin P. Brooks, 77 Cedar Place, Wayne, New Jersey.

Q. Mr. Brooks, do you also go by Pat Brooks?

A. Yes.

Q. And what is your current occupation?

A. I am a group insurance consultant.

Q. For what company?

[573] A. I currently have a contract with the Continental Insurance Company in New York.

Q. Was there a time you were with the New York Life Insurance Company?

A. Yes, from 1951 until 1980, I was employed by the New York Life.

Q. Would you summarize briefly your career at New York Life, what you did, and what your position was?

A. Surely, For most of the time that I was with the New York Life, I was in charge of their group national accounts operation. This involved an organization of some twenty people that would report to me, and they were divided into four units of five apiece. Sometimes the number varied a little, but basically that was about it. Three of these units were located in New York City and

one was located in San Francisco. Each one of these units would be assigned a group of national account cases to represent New York Life.

Now, a national account case was simply identified as a case involving a half million dollars or more of premium. Incidentally, I believe that since I left the New York Life that figure may have moved up to a million dollars or possibly even more, I am not aware.

A national account case could be any kind of a group insurance case. It could be an employer-employee case. A good [574] example would be the Kaiser companies, Southern Railway, World Bank. It could be a public employee case. We handled the State of Washington and the State of Colorado cases.

It could be a trade association case, which would be the Professional Insurance Agents, would be a good example. The National Tire Dealers would be another good example, or it could have been a professional association case, such as the American Bar.

Along about sometime between 1970 and 1975, the professional association cases were taken out of this category and handled by a different group of people, with the exception of the American Bar case. The American Bar Endowment case was always handled by myself and one of the units that reported to me.

Q. Then why was the American Bar case the exception?

A. At the time that the New York Life moved them out and formed a separate unit, the company felt that there was going to be a rapid expansion in the professional association group field that would warrant special attention. By rapid expansion I mean in the number of cases that the New York Life might sell and in the size of those cases, etc., and so it was merely to focus additional sales and service talents of the company on those cases that they pulled it out.

Q. Was it also because of your personal relationship [575] with the Board and the Administrator of the Endowment?

A. The reason that they left the American Bar Endowment case with our National Accounts Unit rather than pulling them out was that myself and the unit had had this long standing relationship. We understood the case. It was not too dissimilar from the other cases that we were already handling, and they felt for that reason it would be in the best interests of New York Life to leave them with them, yes.

Q. Would it be proper to describe your role with respect to the Bar Endowment case as an Account Executive?

A. Yes.

Q. Were you the primary contact with the Board of Directors on behalf of New York Life?

A. Yes. The way in which we would function, we were primarily concerned with the sale and servicing of large group business. In the large case area, we had certain contacts with the American Bar Endowment as with our other large cases. Basically these contacts would fall into about five or six categories.

One would be discussion of contract changes. Another would be discussion of benefit changes. Another would be renewal rating. A very important one was each year we would give a financial report to the American Bar Endowment, as we did to our other large policy holders.

[576] Another category would be any routine service problems. If there was a problem related to claim payment or a problem related to premium collection, we did not handle premiums, and my unit did not handle premiums or claims, but if problems arose with the New York Life, we would step into the picture.

So almost all of the executive contact between the New York Life and the Endowment would come through me and my unit through the Endowment, and from the Endowment Board through me and my unit to New York Life.

Q. How long did you fill that role on the Endowment case?

A. Twenty-five years.

Q. How many board meetings did you attend, Board of Directors of the Endowment meetings, during that twenty-five years?

A. During most of those years the Endowment had four meetings, I believe, and I went to about ninety percent of them.

Q. Mr. Brooks, what is your understanding of the purpose of the group life program to the American Bar Endowment?

A. To raise funds for charitable purposes in the field of law.

Q. Mr. Brooks, I want to show you what has been previously marked as Exhibit 274, and ask you if you can identify it?

A. Yes.

Q. Would you describe this, please?

[577] A. This is a letter that I wrote to Judge Craig to advise the Endowment of my retiring from the New York Life.

Q. Mr. Brooks, in your letter you refer to the fact that during your twenty-five years on the Endowment case, \$33 million has been paid to beneficiaries of the deceased Endowment members, and that \$35 million in dividends had been paid on the life program. Where did you obtain those numbers?

A. Each year we gave the American Bar Endowment a very detailed and complete report of all of the financial aspects of their program with the New York Life. One of

the items on that report would be the current year and the cumulated paid claims. Another item would be the current and accumulated dividends. Both of these figures came from the last one of those reports that had been prepared by me.

Q. Now, I would like to direct your attention to the dividends that were paid on the Endowment case while you were at New York Life, and will ask you some questions about those dividends.

A. Yes.

Q. Were those dividend payments for sponsorship or endorsement of New York Life's Group Life Program with the Endowment?

A. No.

Q. I am sorry?

A. In my opinion, the word "dividend" is really a [578] misnomer in this kind of a case. It is very commonly used because mutual companies determine the amount of return of unused premium by use of a dividend formula. Actually a dividend on this case is really a return of unearned or unneeded premium.

Q. Is the amount of the dividend negotiated between the policy holder and company?

A. No, it is not. The amount of the dividend is solely the result of the application of the New York Life's dividend formula to the particular case. It is in no way negotiable.

Q. And is the dividend a payment for any sort of services rendered?

A. No, it is not.

Q. Is it a payment for bringing a group to New York Life?

A. No.

Q. Is it a payment for assumption of underwriting risk?

A. No.

Q. Is it a payment of any sort of entrepreneurial fee or profit?

A. No. Again, I think it ought to be clear that it simply is a return of premium that was not needed, no more, no less.

Q. While you worked at New York Life, did your group pay any of your large account cases for sponsorship or endorsement or for bringing their groups to New York Life?

A. No.

[579] Q. Why was that? Wouldn't you get more business if you did that?

A. Pardon.

Q. Wouldn't the New York Life have obtained more business if it had paid people to come to it?

A. Well, in most of the group business of the New York Life it wouldn't even be a consideration. The cases that the New York Life obtained were either sold directly by the New York Life, or they were sold by agents of the New York Life or by brokers, one or the other. The only compensation from the New York Life for obtaining business would be paid to an agent of the New York Life or to a broker, not to a policy holder.

Q. These would be people who would have to be licensed under state law?

A. Oh, surely.

Q. And why wouldn't you pay a policy-holder?

A. There would be no need for payment to a policy-holder. In the rare instance where you might have something of that nature, it was against the policy of New York Life to do that. I am referring to a group creditor insurance, where, as I understand it, some companies did compensate group creditor policy-holders. New York Life never did while I was with them.

Q. Do you know why New York Life never did that?

A. They considered it a questionable practice from an [580] ethical viewpoint, and it was against the company's policy to do that.

Q. Mr. Brooks, can you explain, referring now to the administration of the group policy, explain the similarities and difference between the ABE plan administration and the administration of the employer-employee group?

A. Surely. As I mentioned earlier in the testimony, we were handling professional association cases, trade association, employer-employee, public employer groups. In all of those types of groups the administrative functions to be performed are quite similar.

The big difference between a professional association case and the others is that in a group life case with an employer, for example, the employer is paying all or part of the premium.

In a professional association case, the premium comes from contributions from the insured people; therefore, the biggest difference between these types of cases is that on the employer-employee case the enrollment procedure is much simpler.

In a professional association case, the only practical way of enrolling people in the plan is through the mail, and it takes a big and continuing promotional effort through the mail to get the enrollment that you need in a professional case.

* * * * *

[607] [Brooks—Cross] Q. Would you say that the Endowment staff performed a full range of administrative and marketing functions in association with the marketing of the life insurance program?

MS. CARPENTER: I object to that question. What does Mr. Markham mean by a full range of administrative and marketing functions? I think we need a definition of that before the witness can answer the question. Compared to what?

THE COURT: If the witness is unable to understand the question, he is competent to tell us.

THE WITNESS: I would eliminate the marketing part of the question and say that they were certainly competent in the full range of administrative responsibilities that they had. As I mentioned earlier in my testimony, the functions that were performed by the Endowment's office, the processing of claims papers and premiums and keeping of individual records, the screening of medical, are the same type of things that would be done on any group life case that we had. An employer, for example, would have an employee benefit department that would be performing those functions. Take the word "marketing" out. I don't look at the Endowment's office as a marketing operation. It was solely confined to the promotion of the Endowment product of benefits with members of the American Bar Endowment to [608] attract them to enrollment in the plan.

Q. Does New York Life perform any functions with respect to the preparation of promotional material used in the Endowment's promotion of its life insurance program?

A. Most of the time we reviewed the materials after they had been prepared by the Endowment office. There were a few occasions over the years when New York Life group sales promotion people made some suggestions which were then developed by the Endowment's office.

Q. Did you deal personally or did anyone under your supervision deal with anyone specifically on the Endowment staff regarding the preparation and review of promotional documents?

A. Yes, we dealt with the various Endowment staff people that were involved in that activity over the years, and, as I mentioned, New York Life had the Group Promotion Unit that worked through me to the Endowment.

Q. Would you feel qualified to evaluate the quality of the promotional materials prepared by the Endowment in

comparison with those generally disseminated in the insurance industry to promote similar types of insurance plans?

A. I have an opinion on it, yes.

Q. Do you feel that you have enough background to express an opinion? * * *

* * * * *

[610] [Brooks—Redirect] A. No, the professional association cases that are listed here, as well as others that the New York Life had that aren't listed, all returned part or all of the dividends to the members.

MS. CARPENTER: No further questions, Your Honor.

MR. MARKHAM: I have no recross, Your Honor.

MS. CARPENTER: Does Your Honor have any questions of Mr. Brooks? He is the last gentleman here from New York Life Insurance.

THE COURT: I don't have any questions. His testimony was more direct than cross and was very enlightening.

MS. CARPENTER: May he be excused?

THE COURT: Yes. Your testimony was very enlightening.

MR. GREGORY: If Your Honor please, we call William T. Holt.

Whereupon,

WILLIAM T. HOLT

was called as a witness by counsel for Plaintiff and, having been duly sworn by the Trial Judge, was examined and testified as follows:

DIRECT EXAMINATION

MR. GREGORY: Your Honor, we intend after qualifications to offer Mr. Holt as an actuary expert in the field of group health and accident insurance. In order to save time, I have [611] asked Mr. Holt to summarize his

educational background and professional designations. He has made some notes, and I would ask permission for him to read from them at this time.

THE COURT: That is fine.

THE WITNESS: I received a Bachelor's Degree in 1961 from Southwestern College with a major in mathematics.

I am a Fellow in the Casualty Actuarial Society and received that designation in 1970. This is equivalent to a fellow in the Society of Actuaries for Life Insurance. In achieving that designation you have to pass a series of nine examinations, which covers all aspects of various casualty insurance, including health insurance, and primary emphasis then, of course, is on rate making, on reserve methods.

I am also a member of the American Academy of Actuaries, and this includes members of other professional actuarial organizations. This basically has a requirement of both passing examinations of those organizations and some credible work experience in the actuarial area.

My work experience, from 1961 to 1968 I was employed with Travelers Insurance Company in their Group Actuarial Department, working primarily on group life and health insurance. Most of that time I spent in the experience rating area, working with large employers with five hundred employees or more.

[612] A few basic functions that were performed in that area were determining retrospective refunds on large groups and developing the required premium levels to be charged on each of those groups in the next policy year.

My last year at Travelers Insurance Company was spent on the actuarial research area, where our primary emphasis was upon developing new rating procedures and making recommendations along that line, and secondly, evaluating the rate levels with the smaller groups which the Travelers sold and which were pooled for experience.

In 1968 I joined Mutual and United of Omaha, where I have been employed since 1969.

Initially my primary responsibility was in the group actuarial area. It was much broader than the responsibilities I had in Travelers and included all aspects of the actuarial area as pertained to the group life and group health.

Just in summary, some of the functions were to determine the premium refunds, determine the renewal rates to be charged for the groups, evaluating our manual rates, determining what inflation factors were, reserving methods.

I also assisted in the development of new products and developing rates for those products.

In 1974 my experience expanded to include the annual statement area of the group operation. The other significant [613] change in my responsibility took place in 1982, when we had a reorganization of the group operation. I was named Vice-President of Risk Management.

As part of this reorganization, the responsibility of the annual statement was transferred to our financial area, and risk management basically included the group actuarial and group underwriting areas, where underwriting was involved more in the risk selection involving the policy provisions, coordinating all of the various aspects of the groups with the field. We had 3,000 groups and approximately a billion dollars in premium in these lines that we have covered.

These areas include responsibility for the group life insurance, the group AD&D, both short term and long term disability coverages, the broad range of medical coverages, all of the way from hospital indemnity coverages to full comprehensive medical benefits.

We also write dental coverage, vision and prescription drugs.

MR. GREGORY: Your Honor, it has been stipulated in this case that Mutual of Omaha were underwriters for accident and health plans for the American Bar Endowment, disability income known as DID, in hospital indemnity, ESP, major medical catastrophe [sic] medical plan, a plan providing accidental death benefits up to \$250,000, known as DD 250.

* * * * *

[628] [Holt-Direct] Q. You testified that you have participated in sessions with Endowment personnel where rates were negotiated?

A. Yes.

Q. Have you participated in sessions with other group policy holders in which the subject of rates were negotiated?

A. Yes.

Q. Are you able to state whether your negotiations with the Endowment over rates were typical of your discussions and negotiations with other group policy holders?

A. I think there is a significant difference.

Q. What is that difference?

A. In general in our negotiations on premium rates, we, of course, are looking to have a premium rate which will pay for the claims expenses and provide for a margin for fluctuations in the experience. Most of the policy holders are looking to minimize their cash layout and their cost. In the Endowment they are looking for a certain level of refund.

To go back to the general situation, if we agree upon a rate increase and then that develops a significant refund in the following year, then we are frequently criticized for developing too conservative a premium rate.

In 1979, when we had our first premium adjustment on the Endowment, which was on the major medical program, at that time, which was when I attended my first board meeting to make a [629] presentation for that premium rate adjustment.

In going through the figures and the projected experience, when we finished it was a considerably different reaction than we typically receive from the group in that the Endowment was concerned whether it was going to continue to generate a refund, and, as I recall, there was some discussion that if it is not willing to continue the refund then perhaps we should drop the program.

Q. Have the rates on any Endowment insurance plans underwritten by Mutual of Omaha been decreased over the years?

A. Yes, in the disability income program.

Q. Do you know when rate decreases were made?

A. I don't recall the dates that they were made. I think there was one time when benefits were increased twenty percent without any increase in premium rates, which is in effect a rate decrease, and I believe it was when we wrote the group there was a rate reduction from the prior carrier's rates.

Q. Did you participate in discussions with Endowment representatives concerning the reduction of rates?

A. Yes, I believe so.

Q. Was any reason given to you for the rates being reduced?

A. My recollection of the discussions was that it was felt that the refunds were getting almost too high. I believe on the [630] disability program we had one or two years where the refunds approached 70 percent, and I don't know precisely what the Endowment's goals are for their premium refunds, but I know the impression that we were given at that time was that this was really larger than their desired goal.

Q. Would you define for the Court the phrase, "experience refund?"

A. Experience refund is basically the premium that is left over, that remains after all incurred claims are provided for and all expenses. In other words, it would be the premium less the incurred claims, less the retention, would equal the premium refund.

Q. In the industry, to your knowledge, is the phrase, "experience credit," used synonymously with experience refund?

A. Yes.

Q. Is the phrase, "retrospective refund," used synonymously with the phrase, "experience credit" and "experience refund?"

A. Yes.

Q. In your experience, Mr. Holt, is group disability insurance normally subject to an experience credit arrangement?

A. On long term disability, such as we have on the Endowment, only the very large groups would be experience rated, so it is really fairly uncommon.

Q. Why did Mutual of Omaha agree to experience rating on [631] the Endowment disability plan?

A. There were basically two reasons. One, in view of the size of the program. You can expect more stability on their experience than you could on a smaller group. Secondly, the premium rates are established at a level, which is redundant, and from reviewing the prior experience with CNA, as well as our own experience, we know that it runs very stable and is going to develop a significant excess of premiums.

Q. Since we are going to be referring to the experience refund, would you be able to put a quick definition on the board or formula on the board that I could then ask you to explain?

(The witness went to the blackboard.)

A. O.K. All right, with a symbol?

Q. That is fine.

A. P minus IC minus R equals—I am going to have two R 's here. Call this E . P minus IC minus E equals R .

Q. Could you give us the clue to your code?

A. P is premium and IC is incurred claims. The E represents our experiences or our retention, and the R equals the refund. So the premium minus incurred claims minus the expenses would equal the refund.

Q. Would you explain the significance of the various factors in that definition starting with premiums? How do premiums impact an experience refund?

[632] A. Obviously the level of the premiums that are charged is a very key factor in whether any refunds are developed. The premiums basically represent the premiums that are paid on behalf of the insured members throughout the policy period. The incurred claims would be made up of the paid claims on any of those claimants plus any change in our claim reserves that are required to cover future liability on those claimants.

Q. What type of experiences are included under the E ?

A. Expenses that are provided would include the commissions which are paid to the broker. It would include the premium taxes, the cost of the claim administration, our actuarial and underwriting work, and the cost of the Account Executive's time as well as an overhead allocation.

Q. Is there anything included in the E other than the expenses you just named?

A. Yes, we would also have a profit factor in there.

Q. You used the word "retention." Am I correct that retention as used by you equals E as included in your formula?

A. Yes.

Q. Do you use the word "margin" at all in describing your retrospective or experience credit formula?

A. We would not include margin in the retrospective formula.

Q. What is margin?

[633] A. Margin would pertain to the excess in the premium rate over expected claims and expenses of retention. It is used more commonly when you are determining the premium rates on a prospective basis.

Q. Rather than determining experience credit?

A. Yes.

Q. What is Mutual of Omaha's profit on the plans underwritten by Mutual for the Endowment?

A. Approximately one percent.

Q. One percent of premiums?

A. Yes.

Q. Going back to margin, can you state for us the typical margin on a group case within your area of responsibility?

A. Margin would vary with the type of group, depending on how large it is. I would say in general when you get into the larger groups, the margin that we would normally include would be in the area of three to five percent of the premium in setting our rates.

Q. Let me turn to the Endowment plans for which you have been responsible. Can you state the historical margins on the disability plans?

A. I think it has been in the area of forty to fifty percent on the average.

Q. What about in hospital indemnity?

A. It has not been quite as much on in hospital indemnity. [634] Probably more in the area of thirty to forty percent.

Q. Can you summarize the experience with regard to margin on the major medical plan?

A. In the early years the margin on the major medical was quite large, and it has fluctuated. In one year I think it was something less than two percent of the premium, and

in some years since then as a result of our premium rate adjustments it probably has averaged more like twenty to twenty-five percent.

MR. GREGORY: I would like to call Your Honor's attention at this time to paragraph 45 of the stipulation, which sets forth the history of the experience credit or the margin on the major medical catastrophe plan, and explains the impact of inflation upon the results of that plan. That is at page 12. I don't think there is any need, obviously, to read it into the record, but those are facts that have been stipulated concerning this particular plan.

BY MR. GREGORY:

Q. You testified, Mr. Holt, that you participated in setting the original, in the process of setting the original rates for the major medical plan, and that a substantial experience credit was anticipated. Would you explain in your own words what has happened to that plan over the years?

A. The type of coverage which is provided under the major medical is subject to inflationary trends in medical [635] care that we have seen over the past years. As a result, whereas ten thousand dollars was considered a very large claim in 1973, it happens much more frequently today than it did at that time. With the inflationary trends that we have in the medical field and improved medical technology, it has been necessary then to increase the premium rates since the claims cost has gone up and reflected those items.

Q. Do you recall when the rates were first increased?

A. I believe it was in 1979.

Q. The stipulation is that there have been increases in 1979, 1980, and 1981. When these increases were instituted, was there any predictable room in the new premiums for an experience credit being paid to the Endowment?

A. Yes, I believe that we in our discussions with the American Bar Endowment, it was indicated that they would like to have a refund of a least twenty percent. I believe that the premium rates that were charged and effective in 1979 assumed a refund in the area of twenty to twenty-five percent.

Q. Mr. Holt, is the application form utilized by the Endowment typical of the application forms that Mutual of Omaha utilized for group insurance?

A. Not in all respects.

MR. GREGORY: I would like to call Your Honor's attention to page 14 of the stipulations, paragraph 55, where it is stipulated that the applications during the years in issue, [636] which is defined as I defined it previously, contain the following statement: "I understand and agree that any experience credits apportion [sic] to the group policy shall be made payable to the American Bar Endowment as our contributions from the participants."

BY MR. GREGORY:

Q. Mr. Holt, do any of the other association groups' applications with which you are familiar due to your responsibilities have language similar to the Endowment's application?

A. No.

Q. Can you tell us the approximate number of Endowment members insured in each of the plans underwritten by Mutual of Omaha during 1979 to 1981 fiscal years?

A. I believe there are about 19,000 members insured under the disability program, and in the area of ten to eleven thousand employee members insured under the hospital indemnity and major medical, and then about six thousand members insured under the AD&D program.

Q. Is it your testimony that it is about 11,000 in each of the in hospital indemnity and the major medical?

A. Yes.

Q. Is there a broker on the Endowment case?

A. Yes.

Q. What is a broker?

A. A broker is retained by the group policy holder and he [637] provides advice and consultation for them in regard to the benefits, the level of the premium rates, and really is the policy holder's advisor on all of the insurance matters.

Q. Who is the broker on the Endowment case or who was the broker during the years in issue?

A. James Group Services.

Q. What individual representative of James Group Services primarily?

A. Ray Zumbrook.

Q. Have you met with Mr. Zumbrook?

A. Yes.

Q. Can you tell us what role Mr. Zumbrook has taken on occasions when you have met with him in connection with the ABE plans?

A. In the discussions which we have had it has been with both Mr. Zumbrook and Mr. Breiner of the Endowment, and our presentation has been to the two of them. Mr. Breiner looks to Mr. Zumbrook for advice and his counsel on the various matters and Mr. Zumbrook also will ask questions which he feels are appropriate since he is knowledgeable in the area of group insurance.

Q. How is the broker compensated?

A. Mutual of Omaha pays a commission of three fourths of one percent to the broker.

Q. Is this a fee set by Mutual or is it a negotiated [638] commission?

A. It is a negotiated commission primarily between the broker and the Endowment, but Mutual of Omaha also has a part in establishing that fee.

Q. What is your part, sir?

A. We have some general guidelines which we review as far as the level of commissions, and we want to be assured that the level of commissions is not excessive.

Q. In what respect would a commission level be excessive? Let me rephrase the question.

You stated that you reviewed commissions to be certain that the commission was not excessive. What would cause you to conclude that a particular level of commissions for a particular broker was excessive?

A. We have standard commission schedules which we review and use as benchmarks.

Q. Would Mutual of Omaha pay a different level of commissions to James Group Services if instructed to do so by the Endowment?

A. Yes.

Q. Provided it was within your benchmarks?

A. Yes.

Q. Mr. Holt, is the Endowment an insurance broker on the plans underwritten by Mutual of Omaha?

A. No.

[639] Q. Is it an insurance agent?

A. No.

Q. Does the Endowment, Mr. Holt, receive from Mutual of Omaha any payment of any kind for sponsoring the group insurance programs?

A. No.

Q. Does the Endowment receive from Mutual of Omaha any payment of any kind for providing its name and endorsing the group insurance program?

A. No.

Q. Has the Endowment at any time or is it today being paid any fee for bringing the ABE group to Mutual of Omaha?

A. No, it is not.

Q. Has the Endowment ever been paid or is it being paid today for any services as a market maker?

A. No.

Q. Is it being paid for any services as a broker?

A. No.

Q. Has it ever been?

A. No, it has not.

Q. Is it being paid for any services as an agent or has it ever been?

A. No.

Q. Is the Endowment being paid or has it ever been for assuming any underwriting risk?

[640] A. No.

Q. Does the Endowment assume any underwriting risks with respect to its plans?

A. No.

Q. Would you define underwriting risk?

A. Underwriting risk would be a situation where the incurred claims and the expenses, if those two items exceed the premiums, then that excess has to be borne by the risk bearer, which would be the insurance company.

Q. Could the adverse effects associated with an underwriting risk report a loss?

A. Yes.

Q. Have you heard of the phrase, "deficit position," with regard to group insurance?

A. Yes, unfortunately.

Q. What does that mean?

A. What does a deficit mean?

Q. I hate to bring up a sore spot.

A. We have had a lot of those in the last couple of years. A deficit is a situation where the premium we are charging is not adequate to cover the incurred claims and the expenses, and therefore referring to the formula again, if the premium is less than incurred claims less expenses is a negative figure, then there is a deficit that would exist on the group, and that is borne [641] by the insurance company.

Q. Mr. Holt, did Mutual of Omaha during the years at issue or at any time thereafter or any time before make any payment to the American Bar Endowment for any services or for any reason at all other than the experience credit that you have described?

A. No, we have not.

Q. Why do you pay the Endowment the experience credit?

A. Because they are a group policyholders [sic].

Q. Mr. Holt, who prepares the promotional materials for the group insurance plans of the Endowment?

A. The Endowment prepares the material with our review.

Q. What is the purpose and scope of the review of Mutual of Omaha?

A. We review the promotional material as to its accuracy to make sure that it complies with any laws which exist pertaining to the promotional material.

Q. Do Mutual of Omaha personnel ever offer editorial suggestions on the material?

A. I can't answer that.

Q. Would you tell the Court, please, first of all, what underwriting is in the context of accepting risks from your perspective and who performs the underwriting on the Endowment programs underwritten by Mutual of Omaha?

A. The underwriting of the individual applicants is performed by Mutual of Omaha. The applications are sent in to the [642] Endowment, where they would maintain records, but they don't do any underwriting. The applications are forwarded to our office where the underwriting takes place.

Q. Has the Endowment ever participated in screening applications for Mutual of Omaha?

A. Yes. Up until the last couple of years they did an initial screening of the applicants. I think until that time if it was a clean application, with no indication of any health problems, we would go ahead and issue the certificate to the individual. If there were any problems, then it was forwarded to our office for further consideration.

Q. Did the Endowment have any authority to make an underwriting; that is, to decide whether or not a risk might

be accepted if the situation were not covered by your screening rules?

A. No.

Q. Who pays the claims on the insurance plans of the Endowment underwritten by Mutual of Omaha?

A. Mutual of Omaha pays the claims.

Q. Has the Endowment ever paid claims?

A. No.

Q. What is a group policy holder and what functions does a group policy holder perform?

A. A group policy holder is either the employer or the [643] association. The functions which are performed by that policy holder can vary. In general the situations we are involved in that group policy holder would handle the enrollment, be responsible for communicating the benefits and the premium rates that are required to the insureds, and then collecting the premium from the insureds.

Q. Does the group policy holder represent the group in its dealings with the insurance company?

A. Yes.

THE COURT: Let's take a short break. I am going to see if I can get an opinion filed.

(Whereupon, a recess was taken.)

BY MR. GREGORY:

Q. Mr. Holt, who handles the enrollment functions for the Mutual of Omaha programs pertaining to the Endowment?

A. The Endowment.

Q. The Endowment is the group policy holder. Is it unusual in group insurance for the policy holder to handle enrollment?

A. No.

Q. Can you tell us from your experience what functions group policy holders normally perform?

A. They normally handle the enrollment of the insured in the program. They would normally provide for the premium collection [644] and communicating the benefits and the premium rates to the insureds.

Q. When we were looking at the formula for an experience credit, we were talking about expense factors. Are expense factors in group insurance similar to expense factors in individual insurance coverage in the accident and health field?

A. The expense factors would be considerably lower in group insurance than in individual.

Q. Why?

A. Primarily because the insurance company does not have to get involved in the premium administration and the solicitation of employees.

Q. Do you recall the level of the Endowment's gross premiums in the disability program during the years in issue?

A. Approximately three million dollars a year.

Q. Can you tell us what the experience credits were during the years in issue?

A. It varied. I believe it is in the range of something like \$1,200,000 up to approximately \$1,500,000.

Q. Can you tell us what the gross premiums for the in hospital indemnity program were during the years in issue?

A. The premium was about \$1,200,000.

Q. And what about the experience credit for the same plan during the years in issue?

[645] A. It was approximately half a million dollars.

Q. During the years in issue would Mutual of Omaha have been willing to make a reduction in gross premiums paid for the disability and in hospital indemnity programs?

A. Yes, we would.

Q. And how much of a reduction would you have been willing to make for those two programs, namely, disability and in hospital indemnity?

A. We probably would have been willing to decrease the premium rates by approximately thirty percent.

Q. If you had decreased the premium rates by approximately thirty percent, would you have still been willing to have an experience credit arrangement?

A. Yes.

Q. Could you have reduced premium rates on the catastrophe major medical by thirty percent?

A. No.

Q. Why not?

A. The years in question, the experience is not running as favorable as it was in the earlier years, and where we are after premium rate increases rather than decreases, it is possible if the Endowment had not been desirous of a sizeable refund we would have been willing to have had a lower premium rate increase during those years.

[646] Q. On the catastrophe major medical program?

A. Yes.

Q. During the years in issue, Mr. Holt, would Mutual of Omaha have been willing to enter into a contract with the Endowment whereby retrospective rate refunds or experience credits were paid to members by the Endowment?

A. Yes.

Q. And what about a contract in the years in issue under which experience credits would have been credited to premium contributions for the following year thereby lowering premium charges to the members?

A. Yes, we would do that.

Q. Are you familiar with the term "escrow agreement"?

A. Yes.

Q. Did the Endowment have and does it have now escrow agreements with Mutual of Omaha?

A. Yes, it does.

Q. Would you explain, please, what agreements the Endowment has or had, what an escrow agreement is, what is its purpose or function from the viewpoint respectively of the insurance company and group policy holder?

A. We have three of the four coverages that we provide have escrow accounts.* * *

* * * * *

[650] [Holt—Direct] A. Yes.

Q. Mr. Holt, as a group actuary, have you ever heard the phrase, "wholesale price," utilized in connection with accident and health insurance?

A. No.

Q. Have you ever heard the phrase, Mr. Holt, "retail price," utilized in connection with accident and health insurance?

A. No.

Q. Drawing upon your experiences, have you ever heard the word, "middleman," utilized to refer to a group policy holder?

A. No.

Q. Based upon your experiences, Mr. Holt, is there anything unique about a large group having favorable mortality and morbidity experience?

A. I would like to say that it is not unique. It is, unfortunately. In the last couple of years we have had more situations where it has not been favorable than we have had favorable. It is certainly our desire on all of our groups that the experience be favorable.

Q. On the DID and the ESP plan, has the Endowment had favorable morbidity experience from your perspective?

A. Yes.

* * * * *

[676] [Holt—Cross] A. The second difference that comes to mind is that in the communication or solicitation of the program to the insureds, I think it takes on a different type of communication. In the employer-employee situation usually it can be handled through either meetings of the employees or through the inter-office mail.

Obviously on an association it is difficult to have a face to face communication, and so in that situation I think generally it is handled through the mails.

Q. Would there be a distinction as far as the group policy holder representing the group in the employee situation and the association situation?

A. I don't really see a distinction there. There could be in some situations in some associations. The associations have different objectives. In some situations the associations are using the program just to attract members, and in some instances I don't believe that is the case.

Q. They are using it to make a profit?

A. No, I am not aware of any situations that we have where the association is using insurance programs to make a profit.

* * * * *

[695] [Holt—Cross] Q. Why would you be making this type of comparison?

A. There could be a number of reasons why it were made. I think one of the conclusions that one would draw from looking at this program is that the Endowment rates for older employees is lower in relation to our manual, and that the rates for the younger members is much higher, which indicates that the younger employees are subsidizing the older rates. If we were charging our regular actuarial rates that are in accordance with our manual, we would be charging lower rates for the younger people.

What we are really saying is if they want to increase the premium rates for the older employees we can lower the younger ones.

Q. What does 75 percent industry factor mean, .75?

A. Point seventy-five industry factor would reflect that the particular insureds that are covered by the Endowment policy are a better risk than is anticipated in our manual, and therefore they have been discounted 25 percent to reflect that favorable morbidity.

Q. Why would you take that into account in a rate, for instance?

A. You note that footnote applies to the manual rate. The Endowment's rate is the gross rates that are included in the brochure.* * *

* * * * *

[724] ELIZABETH LOCKE

was called as a witness by counsel for the Plaintiff and having been duly sworn by the Trial Judge, was examined and testified as follows:

BY MS. CARPENTER:

Q. Miss Locke, would you state your name and address for the record?

A. My name is Elizabeth Locke. I live at 3611 West 214th Place in Madison, Illinois.

Q. And you're employed by the American Bar Endowment?

A. I am.

Q. And how long have you been employed?

A. Since 1977, six years.

MS. CARPENTER: Your Honor, in order to save time, I asked Miss Locke to make some notes as to her various positions at the Endowment and I'm going to ask her simply [725] to describe what she did when for the Endowment?

A. When I was hired by the Endowment in October of '77, I was hired as their production coordinator and that involved monitoring budget expenses and expediting the mailing printing of pieces for the insurance programs. In the spring of 1978, I was promoted to Assistant Manager of Publications Department and my responsibilities stayed pretty much the same.

In January of 1979, I was promoted to the manager of the Department and at that time I began taking on some of the editorial responsibilities for actually writing the direct mail pieces.

Q. Miss Locke, by what means are the Endowment insurance programs promoted?

A. We use exclusively direct mail.

Q. Do you ever advertise in magazines?

A. Yes, we do.

Q. And what magazines do you advertise in?

A. We limit that to ABA publications.

Q. Do you ever advertise on radio or television?

A. No.

Q. During the period of July 1, 1978 to June 30, 1981, which I'll call from now on the years in issue, during the years in issue were the Endowment insurance programs promoted [726] to anyone besides Endowment members?

A. No, we only promote to the ABA, ABE membership.

Q. And do you have custody and control of the Endowment files containing publications sent to Endowment members?

A. Yes, I do.

Q. Now, during the years in issue, how often were the Endowment insurance programs promoted to the members?

A. Normally each of the insurance programs was promoted once each year.

Q. And are there any exceptions to that?

A. Yes, occasionally [sic], for various reasons we would not be able to complete the full promotion schedule of one program once each year.

Q. And would you ever promote a program more than once a year?

A. Yes.

Q. How often would that occur?

A. Very infrequently.

Q. I'm going to show you what's been marked as Exhibit 862 and ask you if you can identify it.

A. Yes, this is a summary of promotions and what it is is a summary of the promotion responses for each of the promotions mailed during the fiscal year of '78-'79.

Q. Now, I'd like to direct your attention to page one [727] which is actually the third page of this document and if you could explain to the court what is represented on page one?

A. Page one is the actual mailing schedule and it lists the promotion being mailed, the people receiving it and the approximate quantity.

Q. Would the numbers in parenthesis be the numbers of members who received that particular item?

A. Yes, the disability promotion, the first one listed, the second mailing quantity is incorrect on here. It should be—If you read, to whom it was directed, it's identical to the first, so it should have been 170,000 rather than 70,000.

Q. So, would I read this correctly that on August 14th, 170,000 members received a brochure with respect to the disability and the ESP program?

A. That's right.

Q. And then on August 28th those same members got another brochure about the same program?

A. That's right.

Q. And then on August 21, what's termed an annual report was sent to 60,000 members. Now, to whom were the annual reports sent?

A. The annual report that year was sent only to members who were insured in any or several of our insurance programs.

[728] Q. I'm going to show you what's been marked as Exhibit 313 and ask you if that is the annual report referenced?

A. Yes, it is.

Q. And, what's the purpose of this annual report?

A. It's a courtesy to our membership, to let them know that by way of the donations that they've made to the insurance programs exactly what's been accomplished by the recipients of the grants for that year. Sometimes it will cover projects that are long term projects and keep them up to date, where they stand with those projects.

Q. And was this sent every year to the insured members?

A. Yes, it was until four years ago, we published the annual report instead in the American Bar Association Journal.

Q. And what is the circulation of the American Bar Association Journal?

A. That goes to everyone of the American Association members as well as some of the law students, law student division of the ABA.

MS. CARPENTER: Your Honor, I move Exhibit 313 be admitted into evidence.

MR. DENNIS: No objection.

THE COURT: It's admitted. You haven't moved —

MS. CARPENTER: I was going to do it later, but [729] I'll do it now.

THE COURT: I was just asking.

MS. CARPENTER: I'll move it into evidence at this time, Your Honor.

MR. DENNIS: I think all the promotion summaries are stipulated that they're admissible. No objection.

THE COURT: Than [*sic*] they're both admitted.

(Plaintiff's Exhibit No. 313 and 862 was received into evidence and made a part of the record thereof.)

BY MS. CARPENTER:

Q. Next, Miss Locke, I'd like to direct your attention to the insurance benefits report, which is indicated there on page one. Could you tell us to whom that was sent?

A. The insurance benefit report is an itemized listing of individual member coverage. It's personalized. One is

sent to each of our insured membership letting them know exactly what coverage they have, as well as the benefits and premiums.

THE COURT: I wasn't catching where — Is this part of Exhibit 862?

MS. CARPENTER: The fourth item down that's listed under the promotion schedule indicates an insurance benefits report mailed to all insured members.

THE COURT: All right.

[730] BY MS. CARPENTER:

Q. Miss Locke, I'm going to show you what's been marked as Exhibit 839 and ask you if that is the report of reference there?

A. That is.

Q. Does this insurance benefits report make any reference to the functions or purposes of the Endowment?

A. Yes, it did. Most of our material that's mailed out does. This appears on the back of the statement.

MS. CARPENTER: I offer 839 in evidence.

THE COURT: Has that been stipulated?

MS. CARPENTER: I don't believe, sir.

MR. DENNIS: No objection, Your Honor.

THE COURT: Okay, it's admitted.

(Plaintiff's Exhibit No. 839 was received into evidence and made a part of the record thereof.)

MS. CARPENTER: And they're such attractive, brightly colored exhibits.

BY MS. CARPENTER:

Q. I notice under the September 18th mailing of the insurance benefits report there's a reference to an October mailing of something called the Combo. Could you tell us what that was?

A. Yes, the combination booklet is a single bound [731] format, descriptions and applications of each of the five group insurance programs.

Q. And, does the combination booklet contain a statement with respect to the purposes of the Endowment?

A. Yes, it does. Usually there's one somewhere on the cover or back cover and in the descriptions of the programs themselves.

Q. Miss Locke, next I'm going to show you an exhibit that's been marked as Exhibit 791 and ask you if you can identify it?

A. Yes, I can. This is a booklet that covers the purpose of the Endowment, the fact that it's a charitable organization and that we make grants to further legal research. It's [sic] use has been in our new member's solicitations. Each week we get lists of new members of the ABA and this was a letter from the President of the Endowment. It is mailed to each of these individuals, new members.

Q. And, what is the purpose of mailing out the booklet?

A. To educate them about what the Endowment is.

Q. Does the booklet make reference to the insurance program?

A. There's a brief summary of what the insurance programs are, what they offer.

Q. And what is the primary focus of the booklet?

[732] A. To let them know that we're a charitable contribution and through their participation in the insurance programs that they can further the activities of the Endowment, funding legal research.

Q. And for how long was this booklet or similar booklets used?

A. Very possibly before 1976. My earliest file copy that would indicate that it was used in the new member campaign was 1976.

Q. And prior to 1976, was there any letter or booklet that went to new members to explain what the Endowment was and what it did?

A. I'm sure there was. The files of the Endowment for years prior to '76-'75 [sic] are not entirely complete and they don't give adequate descriptions of the use of whatever the pamphlets were.

Q. But do you have letters from the president in your files that indicated what the Endowment is and what it does?

A. Yes.

Q. And, is this booklet still in use?

A. No.

Q. Why was it discontinued?

A. It's a matter of economizing. This particular text is expensive and just a matter of budget, we decided to [733] eliminate this and consolidate the two mailings into one. About the same time we eliminated the use of this booklet, we created a pamphlet.

Q. I show you what's been marked as Exhibit 333 and ask you if that is the pamphlet you referenced?

A. Yes. This was developed in about June of 1980 and it's initial use was for distribution at admission ceremonies, state bar admission ceremonies. The American Bar Association membership department attends the ceremonies or at least several of the major ones and they offered to distribute these on our behalf.

And about a year later we added a lot more information to this booklet and began mailing it to graduating law student division members.

Q. Does it continue to be used at Bar admission ceremonies?

A. Yes, it does.

Q. And is it part of your new member campaign?

A. No, it's not.

Q. When did you discontinue use of the "What It Is, What It Does" booklet?

A. About June of '80.

Q. And that was replaced with the salute to new lawyers?

[734] A. No response.

Q. Miss Locke, I think it would refresh your recollection if you looked at the print date on the "What It Is, What It Does?"

A. That's right, 2-81. So, we used it—Probably that was the print date. We used it through the end of that fiscal year, so during the summer of '81 is when it was finally discontinued.

MS. CARPENTER: Your Honor, I offer Exhibit 791 and Exhibit 333 in evidence.

MR. DENNIS: No objection, Your Honor.

THE COURT: Okay, admitted.

Plaintiff's Exhibit No. 791 and 333 were received into evidence and made part of the record thereof.)

BY MS. CARPENTER:

Q. Miss Locke, I'm going to show you what's been marked as Exhibit 883 and ask you if you can identify it?

A. Yes, this is another summary of promotions for essentially the fiscal year '79-'80. There's one or two that overlap into the next fiscal year. It's just a one-line summary as opposed to providing a breakdown of response, as well as sample materials.

[735] BY MS. CARPENTER:

Q. Would the numbers under the heading, Mailing Total, indicate the number of members to whom a brochure was sent?

A. Yes, that's right.

Q. And I notice you use the word prospects on there. What does that mean?

A. That's to distinguished [*sic*] from those people already insured in the program, their uninsured [*sic*] people.

MS. CARPENTER: Your Honor, at this time I offer 883 in evidence.

MR. DENNIS: No objection, your honor.

THE COURT: Admitted.

(Plaintiff's Exhibit No. 883 was received into evidence and made a part of the record thereof.)

BY MS. CARPENTER:

Q. Miss Locke, what was the budget for the publications department during the years in issue, approximately?

A. It averaged between \$300,000 to about \$360,000 each year.

Q. And, what expenses did that budget cover?

A. It was assembled to expedite the mailings and all of the costs incurred in producing these mailings, which would include promotional materials, the expense of mailing [736] house postage, express and freight, data processing for the labels, that's about it.

Q. Next I'm going to show you what's been marked as Exhibit 813 and ask you if you can identify it.

A. This is another—Or, this is a combination booklet, typically used in a new member mailing list. After the new member would receive the, "What It Is, What It Does" book that explains the purpose of the Endowment, he would receive this combination booklet with a letter from the Administrator, explaining each of the insurance programs.

Q. Would anyone besides new members receive a combination booklet?

A. Yes, in response to calls on our watts line or direct calls to the office or even correspondence if someone was requesting insurance information, these would be mailed to them.

Q. And approximately when was this particular booklet used?

A. This is a print date of '76, so it was probably used for most of 1976.

Q. And, is there reference in the combination booklet to the purposes of the Endowment insurance program?

A. Yes.

Q. And, could you direct us to where that appears?

[737] A. As you open the inside front cover,—

Q. That block entitled, "The Endowment Story?"

A. Yes.

Q. Next I'm going to show you what's been marked as Exhibit 799 and ask you if you can identify it.

A. This is yet another example of the combination booklet that we, again to new members as a second mailing with a letter from the Administrator. This was used at—As this previous combination booklet was depleted, this was created to take its place at the end of '76.

Q. And, how long was this booklet used for?

A. Probably just for that fiscal year.

Q. And, does it also contain a statement with respect to the purposes of the Endowment Insurance Program?

A. Yes, the member would receive this with the label on the front, where the gold tab is you open it up and it would be right there on your right, the Endowment purpose.

Q. So, the mailing label would be on the front where the gold seal is and when the member opened it up, that would be apparent there?

A. Yes.

MS. CARPENTER: Your Honor, I offer Exhibits 813 and 799.

MR. DENNIS: No objection.

[738] THE COURT: Okay, admitted.

(Plaintiff's Exhibit No. 813 and 799 was received into evidence and made a part of the record thereof.)

MS. CARPENTER:

Q. Miss Locke, next I'm going to show you Exhibit 332 and ask if you can identify it.

A. Yes, this is another combination booklet that was used as a second mailing in the new member campaign. It was used for the period August '79 through April 1980.

Q. And, is there a statement with respect to the purposes of the Endowment in this combination booklet?

A. Yes, this booklet is unique in that it had a die cut in the back that would hold the applications and there is two statements in this particular book, one on each side as you open it to get the applications. One is the Endowment story and one specifically addresses the premium refunds agreement.

Q. So that, in order to pull out an application you would have to see the statements with respect to the purposes of the program?

A. Yes, several statements, as well as in the application.

Q. Now, has the application always referenced the disposition of dividends or experience credits? (Witness nods head.) You have to [739] say yes.

A. Yes, always.

MS. CARPENTER: Your Honor, I offer 332 in evidence.

MR. DENNIS: No objection.

THE COURT: Okay, it's admitted.

(Plaintiff's Exhibit No. 332 was received into evidence and made a part of the record thereof.)

BY MS. CARPENTER:

Q. Miss Locke, next I'm going to show you Exhibit 331 and ask you if you can identify it?

MS. CARPENTER: And, your Honor, we didn't have two copies of the original 331, so in order that you could see the format of 331, I brought a subsequent version, that the pockets are the same, but the inserts are different, so I'll take this back, but I just wanted you to see what the original looks like, if there's no objection from Mr. Dennis?

MR. DENNIS: No objection.

THE COURT: Thank you.

WITNESS: Yes, this was the combination booklet that was developed when we stopped using the previous exhibit which was in June of 1980 or April of 1980. It was used until June of 1981. This was again a followup mailing to new members after they had received a greeting from the [740] new president and the booklet about the Endowment functions.

This particular brochure was developed purposely with pockets to hold individual brochures to accommodate changes in the brochures that could then just be one brochure taken out and thrown away. It was an effort at economizing.

Q. Okay, but the reference to the Endowment story would stay the same, no matter how the plans changed?

A. Yes, the jacket itself never changed but the contents did.

Q. Is that jacket still in use?

A. Yes, it is.

Q. And, would all of these combination booklets have been sent to members who inquired about the program in addition to new members?

A. Yes, always.

MS. CARPENTER: Your Honor, I offer 331 in evidence.

MR. DENNIS: No objection.

THE COURT: Admitted.

(Plaintiff's Exhibit 331 was received into evidence and made a part of the record thereof.)

BY MS. CARPENTER:

Q. Miss Locke, next I'm going to show you Exhibits 203, 202, 201 and 219 and ask you if you can identify them?

[741] A. These represent tax deduction notices that are sent to our insured membership annually. In the earlier years, a card was produced for each of the programs, advising the member of the percentage of their premium payment that they could deduct on their income tax as a charitable contribution.

In later years, as an effort for economizing, as well as we had more to say about the contribution issue, we went to a folder that could list each of the insurance programs and their respective dividend amounts so that all of the members insured would receive all of the information

with an added paragraph about the adverse ruling about charitable contributions, letting the members know that we would advise them as developments warranted.

Q. Now, were these notices sent to every insured [sic] member?

A. Yes, there were, each year, as the figures became available from our auditors, usually in November or December and they were mailed first class to the membership.

MS. CARPENTER: Your Honor, I offer these exhibits in evidence, that's 201, 202, 203, and 219.

MR. DENNIS: No objection.

THE COURT: Okay, they're admitted.

MS. CARPENTER: Thank you, Your Honor.

[742] (Plaintiff's Exhibit Nos. 201, 202, 203, and 219 were received into evidence and made a part of the record thereof.)

MS. CARPENTER: Your Honor, in order to save time, I have clipped together exhibits 204 through 214, 216 through 218, 220 through 224, 189 through 200 and Exhibit 801.

These are the deduction notices for earlier years. They've all been stipulated into evidence, except for some reason Exhibit 801 was admitted from that and I have clipped your copy together in chronological order rather than in exhibit number order because it makes more sense that way, but the originals are simply clipped and not stapled together.

I'm going to ask the witness to identify these cards.

THE COURT: What were those numbers again?

MR. DENNIS: They've already been stipulated in the stipulation. I don't see any reason to have her identify them. We don't have any objection to their admission into evidence.

MS. CARPENTER: Yes, there's only one that's not stipulated and that's 801 and I assume you don't object to that.

MR. DENNIS: I have no objection to that.

[743] THE COURT: There's no reason to have the witness identify them then, if you want to ask questions about them, but I would like to know what those numbers were again for my records.

MS. CARPENTER: 204 through 214, 216 through 218, 220 through 224, 189 through 200 and then 801.

THE COURT: All of those are admitted by stipulation.

MS. CARPENTER: Thank you, your Honor.

Plaintiff's Exhibit Nos. 204 through 214, 216 through 218, 220 through 224, 189 through 200 and 801 were received into evidence and made a part of the record thereof.)

BY MS. CARPENTER:

Q. My only question for the witness was, how far back in the Endowment files do you find these tax deduction notices?

A. As far as we can discover in our own files, 1964.

MS. CARPENTER: Thank you. Your witness, Mr. Dennis.

MR. DENNIS: Your Honor, before we start, could I have five minutes to get my exhibits together. We were trying to call out last night what we were going to use this morning and we haven't quite completed the process.

THE COURT: Trying to find a few juicy ones?

* * * * *

[748] [Locke—Cross] A. If you see me sitting like this, I'm having trouble hearing.

MS. CARPENTER: The witness has a hearing problem.

THE COURT: We'll all speak up.

BY MR. DENNIS:

Q. I'd like to show you what's been marked as Defendant's Exhibit 538. I'd like to ask you if this is a document that you would use in developing your—the budget that you have for your publications department?

A. Well, this is something that's developed in concert with the development of the budget. Initially we work kind of backwards. There's given an appropriate budget figure, arrange, and meeting with Mr. Breiner and he tells me what he would like to accomplish in the way of promotions that year, what age groups, et cetera.

My heaviest responsibility here is to specify actual package formats and costs, broken down and attach bid sheets to accomplish the objectives that Mr. Breiner has indicated.

Then probably the last thing we do is develop this particular mailing schedule.

Q. And this is then sent to the insurance carrier?

A. The mailing schedule?

Q. Yes.

[749] A. No, it's not. Sometimes as a courtesy we'll do that. It's nothing they have to approve or disapprove.

Q. Now, would this be a typical mailing schedule that you would have during the years 1979 through 1981?

A. Yes, it represents a single mailing to each of the insurance programs.

MS. CARPENTER: Mr. Dennis, was your question whether she had a schedule like that? You mean the piece of paper, or do you mean the frequency of promotion?

MR. DENNIS: The frequency of promotion, the schedule.

BY MR. DENNIS:

Q. Is this a typical promotion schedule?

A. It appears to be, one mailing or one major promotion for each of the insurance programs.

Q. Now, how many promotional packages might an individual receive who is a member of the Endowment during the year? Could it be as many as 12?

A. Well, there's five group insurance programs. Each one's promoted and there are two mailings. For each mailing, a separate age group is determined. If the age groups

overlap and that person is in that overlapping area, he would receive a maximum of ten mailings, two of each of the insurance programs.

[750] MR. DENNIS: Your Honor, I move that what's been marked as Exhibit 538 be admitted into evidence.

MS. CARPENTER: Your Honor, I don't object, but I note for the record that it's a schedule for one of the years that's not in issue and we've already put into evidence what schedules we have for the years at issue.

WITNESS: I should also point out to you that that's our goal or objective for the year and many times it's not met. We either don't complete it, or we reschedule the promotions and that particular one, there's indications of a number of page ads, or quarter page ads that we never accomplished.

BY MR. DENNIS:

Q. But this would be sent to the Board when they're approving the budget?

A. Yes.

THE COURT: Mr. Dennis, I'll admit it, if there's no objection, but just so I know what to do with it.

MR. DENNIS: I'm just offering it into evidence to indicate the review process that goes on concerning the budget and the fact that the Board of Directors reviews the advertising budget. * * *

* * * * *

[777] [Locke—Cross] Q. And the insurance carriers would approve that statement?

A. Yes.

Q. I'd like to call your attention to what's been marked as 900-A. Is this an exhibit which you prepared?

Excuse me, is this a piece of promotional literature that you prepared?

A. Yes, it is.

Q. You came up with the idea to use the bandaid on the cover?

A. Yes, I did.

Q. What did you intend to indicate when you were using the bandaid?

A. It's an understatement.

Q. It's a what?

A. An understatement.

Q. Indicating to the member what? What were you attempting to convey to the person that was reading the literature?

A. That this is something that is far—that it's catastrophic insurance and mentioning that when a simple bandage isn't enough, is almost being sarcastic. It's an understatement.

Q. Now, in the fourth paragraph when you state, in [778] the second sentence, read the facts explaining how the plan works and how little it costs in terms of the benefit potential. When you're stating how little it costs, you're again referring to the semi-annual premium payment?

A. Premium payment, yes.

Q. Now, the second page of the promotional piece, you have a listing of various diseases that scare me just looking at them. Would you read the first four diseases?

A. Would I read them?

Q. Yes.

A. Yes. Carcinoma, stomach. Cystic Fibrosis, Coronary Artery Disease, Multiple Sclerosis.

Q. What would be the medical expense submitted on the right-hand side? What would that be to indicate?

A. Do you mean why did I have it there or what is it?

Q. Yes, what is it and why did you have it there?

A. Both. It's included to show the amount of money that was paid to the members after they established their chosen deductible amount, which was \$15,000.

Q. And you've got how many examples on the page there, 30-40?

A. Several.

Q. Would you call this a hard sell advertising?

A. No, I wouldn't.

[779] Q. Isn't this an example of scare tactics?

A. Actually no, it's not.

Q. Do you recall the deposition?

A. Yes, I do, Mr. Dennis, very well. And, your question to me during the deposition was exactly that, would you call this a hard sell approach and I said, no, I would call it a scare tactic and that was after about 18 hours of being deposed and identifying about 35,000 different documents and it was an effort to dismiss further discussion because we had been through this several times during the deposition. You were trying to insist that we use hard sell, me asking you to define what hard sell was, and so if you're asking now if this is hard sell, I say, no, that it's not.

Q. Did counsel advise you how to respond to the question?

A. No.

Q. What kind of sell would you call it? Soft sell?

A. Quite frankly, Mr. Dennis, I don't—at the entire time I've worked at the Endowment have never felt compelled to categorize styles I use in my cover letters. I can tell you why I did this, why I listed it this way. I thought it was a very effective way to let anybody know who is not actually experienced hospital expenses that the cited \$10,000 [780] or \$15,000 deductible amount, which seems just staggering is not, in comparison with the actual claims or payments of claims made after the deductible has been established. This is a sampling of more than 150 claims that were at work at the time.

Q. I'd like to call your attention to what's been marked as Exhibit 909, excuse me.

A. Exhibit number what?

Q. 909.

A. I have 909-A.

Q. Yes, excuse me, that's the exhibit number, 909-A. Now, did the Endowment also advertise their insurance product in magazines?

A. Yes, the Endowment uses three ABA publications, to periodically place page ads. One is the ABA Journal, the other is the Young Lawyer Divisions, Barrister Magazine and the third is the Law Student Division, Student Lawyer Magazine.

Q. Now, on the—what's been Bate marked as 8017,—which would be the sixth page of the document, states, when you see the semi-annual group rates, I believe you'll agree this is also of insurance protection at a very economical cost.

Is this a piece of advertisement that was used on this page by the Endowment?

[781] A. It is a copy of a page ad that appeared in the American Bar Association Journal, yes.

Q. Would that be typical of the type of reference that you would have to cost in the American Bar Association Journal?

A. I didn't find where you were quoting, Mr. Dennis. What's typical about it is that we refer to the premium always as affordable group rates or economic costs, yes, that's typical.

Q. That would be the semi-annual premium that the member would have to pay to the Endowment?

A. The cost we're referring to is premium payment, yes.

Q. Now, which magazines again did you say that you published in, the ABA Journal and what other magazines?

A. The ABA Journal, which is the one we placed page ads in most frequently and we also have the option of using the ABA's Barrister, which is a young lawyer publication and student lawyer, which is law students.

Q. And the page I've shown you would be a typical advertising piece that you would use in those magazines?

A. Well, no, in the Journal and the Barrister Magazine, they're received by full privileged voting members of the ABA, so we could mention cost and the insurance program.

* * * *

[801] [Locke—Cross] Q. I'd like to read to you the last two paragraphs of what's been marked as Exhibit 781. Competition for our specific marketing includes every legal group having group insurance plans, including alumni associations, fraternal organizations and other legal associations, such as American Association of Trial Lawyers, the Federal Bar Association, Criminal Law League, the Legal Arts Insurance Trust, to name just a few, and also the law student division of ABA, offers insurance to students while still in law school and provides a special conversion after graduation.

In the next paragraph, direct mail competition for the insurance market, in general, includes the major credit card companies like Visa, Master Card and American Express, as well as the major oil companies and department stores.

Where did you get this particular information? Did Mr. Breiner provide some of that information to you?

A. Where did I get this? Well, in the first paragraph that you referred to, I get samples of their material and we keep them on file. Now, when I say competition in this context, I'm talking about the fact that they're available. I'm not talking about benefits or features or rates, just [802] the fact that these people also can reach the members of our group and offer them insurance.

This second paragraph, just as my own experience.

Q. And, I'd like to now call your attention to what's been marked as Exhibit 1303, 1304, and 1305 and ask you if those are the responses that you received from the three companies, with respect to the letters that you mailed to them?

A. 1303, 1304, and 1305?

Q. Yes?

A. Yes. Well, let's see. They enjoyed meeting with us. These are not responses to the correspondence from Rick Breiner. These are—This first one anyway, 1303, is, after having met with Rick Breiner and myself, to discuss all of that.

I suspect that's true of the Burson Marsteller, yes, and also Richard's Direct. This is after initial meetings with us.

Q. Now, was the Kestnbaum company ultimately selected?

A. Pardon?

Q. Was the Kestnbaum Company ultimately selected?

A. Yes.

MR. DENNIS: Your Honor, I move that these documents be introduced into evidence.

* * * *

[809] [Locke—Cross] A. When I wouldn't want it to be clear?

Q. Yes.

A. It's not a case of not wanting it to be clear. It would be addressing an area that is ambiguous to begin with. Like group rates, where we stand with group rates. They go all over the Board. So, we don't want to say to the membership, we have the worst group rates there are, because we're trying to get them to enroll in the programs.

So, we say, reasonable group rates, attractive group rates, modest group rates and that's in that—That's why it's purposely ambiguous.

Q. Do you hope that the member will be influenced by the language choice that you use in deciding whether or not to buy the product?

A. If they—I hope they're influenced by what?

Q. The language that you use in the material?

A. Well, I don't expect to really capture them with exactly what I'm writing. We're obligated to give them some information about the programs and of course we want that to be as positive and perceived by them as positively as possible so that they would consider enrolling in the programs.

I rely as well on the features of the insurance programs, the unique position of the Endowment, to draw them in, so there's really three factors that I'm relying on to kind of counter my copywriting.